

**AN ANALYSIS OF THE CONSTITUTIONALITY AND EFFECTIVENESS
OF THE 1973 WAR POWERS RESOLUTION**

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Abstract

In my thesis, I analyze the constitutionality and effectiveness (both historic and future) of the 1973 War Powers Resolution (WPR). The Founding Fathers, in an effort to prevent the rise of a tyrant, split the war powers in the Constitution between the executive and legislative branches. Ever since the Constitution's ratification, the executive and legislative branches have struggled to define their war powers authority. The WPR was an attempt by Congress to provide a constitutional framework for the executive and legislative branches to navigate war powers issues in accordance with the powers the Constitution vests in both branches. In 1973, Congress passed the WPR into law over the veto of President Nixon. The law has been highly controversial since its enactment. Nearly every president has questioned its constitutionality, and many critics, from members of Congress to constitutional scholars, believe it has failed to curtail presidential war.

In my first chapter, I provide a legislative history of the law, review its controversial sections, and review the current body of applicable court cases which help define the extent of each branch's war power authority. In my second chapter, I provide eleven case studies of the WPR's use between 1973 and the present, and build off a 1997 study by political scientists David Auerswald and Peter Cowhey who performed an empirical analysis of the effectiveness of the WPR. In my final chapter, I review prospects for the WPR's future effectiveness based off attempts to amend or repeal the law, its applicability to the modern battlefield, and the executive and legislative branches' contemporary interpretations of it. After reviewing the history of the WPR and its impact on conflicts since 1973, I agree with those who claim the WPR, while an imperfect

document, is constitutional, has made a difference, and helped to curtail unilateral presidential war.

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Introduction

Arguably the most important decision any president and Congress can make is the decision to take the nation to war. The Founding Fathers, in an effort to prevent the rise of a tyrant, split the war powers in the Constitution between the executive and legislative branches. The Constitution gives Congress the definitive authority to declare war as well as raise and maintain armies under Article I, Section 8. The Constitution also designates the president as Commander in Chief of the armed forces under Article II, Section 2. The president also has implicit authority to defend the nation in times of emergency.

However, between outright war and a president's emergency powers to defend the nation is what Supreme Court Justice Robert Jackson called a "zone of twilight."¹ Ever since the Constitution's ratification, the executive and legislative branches have struggled to define their war powers authority between the two vague designations of authority in the Constitution and within the "zone of twilight." The 1973 War Powers Resolution (WPR), about which I have written my thesis, was an attempt by Congress to provide a constitutional framework for the executive and legislative branches to navigate war powers issues in accordance with the powers the Constitution vests in both branches.

In June 1950, President Truman deployed United States (U.S.) forces to aid in the defense of South Korea from the North Korean invasion. The Korean War would last three years. U.S. casualties from the war would be over 33,000 killed and 92,000 wounded. An estimated 2.5 million civilians would die during the war.² Congress never formally declared or authorized war against North Korea. Instead, President Truman

¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

² Korean War Casualties, accessed on August 17, 2013, http://en.wikipedia.org/wiki/United_States_military_casualties_of_war, and Korean War Civilian Casualties, accessed on August 17, 2013, http://en.wikipedia.org/wiki/Korean_War#Casualties.

claimed the operation was a “police action under the United Nations [U.N.],” thus citing authorization from the U.N., not Congress as required by the Constitution.

The U.S. would fight the Vietnam War in the 1960s and 1970s under similar circumstances. While Congress gave its authorization for the use of force in Vietnam through the 1964 Gulf of Tonkin Resolution, it did not anticipate the massive expansion of the U.S. military presence in Vietnam. In 1967, President Johnson stated of the resolution, “We stated then, and we repeat now, we did not think the resolution was necessary to do what we did and what we are doing.”³ The Nixon Administration would take this same position on presidential war powers stating, “this Administration has not relied on or referred to the Tonkin Gulf resolution of August 10, 1964, as support for its Vietnam policy.”⁴ U.S. casualties for the Vietnam War would be over 58,000 killed, 303,000 wounded. Estimates for civilian casualties in and around Vietnam would be as high as 2.5 million.⁵

By the late 1960s, Congress began to grow frustrated with the unchecked growth of presidential power during the Korean and Vietnam Wars. One State Department legal analyst described the executive’s war powers as “very broad,” and congressional approval was “at best a needless formality, and at worst, may occasion a dangerous delay.”⁶ As a result, Congress would begin to take action to reassert its constitutional rights eventually declaring “the constitutional ‘balance’ of authority over warmaking had

³ S. Rpt. 606, 92nd Congress, 2nd Session, page 7.

⁴ S. Rpt. 606, 92nd Congress, 2nd Session, page 19.

⁵ Vietnam War Casualties, accessed August 17, 2013, http://en.wikipedia.org/wiki/Vietnam_War.

⁶ Memorandum prepared by Leonard Meeker, State Department. On the Legality of the United States participation in the Defense of Vietnam, 54 Department of State Bulletin, pp 484ff U.S. Department of State, Washington DC, 1966, as cited in Nathan, James A., “Salvaging the War Powers Resolution,” *Presidential Studies Quarterly*, Volume 23, No. 2 (1993), page 238.

swung heavily to the President in modern times, and that Congress is now required to reassert its own prerogatives and responsibilities.”⁷

On November 7, 1973, Congress passed Public Law 93-148 into law over the veto of President Nixon. Public Law 93-148 is the WPR, and its purpose is to “[ensure] that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”⁸ The WPR has been highly controversial since its enactment. Nearly every president has questioned its constitutionality, and many critics, from members of Congress to constitutional scholars, believe it has failed to curtail presidential war.⁹

Most discussions about the WPR are single chapters in books on presidential or congressional power or 20-40 page papers in academic journals discussing certain aspects of the law. As a result, it is difficult for any reader to get a full understanding of the WPR and all of its intricacies from a single source. The WPR is a fascinating subject. First and foremost, it is a classic separation of powers subject. All three branches of government play a role in shaping the WPR, both in their era, and also for the future. Second, the WPR is a powerful document which helps to shape a major part of U.S. foreign policy. Finally, and most importantly, the WPR helps to shape how the U.S. initiates and conducts war.

The American public rarely hears about the WPR. However, since 1973, the executive branch and Congress have constantly cited it in the discussions and parameters surrounding every major military action in which the U.S. was involved. Anytime the

⁷ H. Rpt. 1547, 91st Congress, 2nd Session, page 2.

⁸ Public Law 93-148 (see Appendix 1).

⁹ See footnote 681 for the Obama Administration’s position on the WPR.

U.S. contemplates going to war, the WPR helps shape the discussion. And, while the public may believe the U.S. never declares war anymore, or that perhaps the president now has more power than Congress in taking the country to war, the WPR is working behind the scenes as the primary legal framework for war matters, only second to what the Constitution explicitly says about war. In the U.S.' current military crisis against the Islamic State, President Obama in February 2015 specifically cited the WPR in his request for authorization from Congress to conduct military operations in Syria and Iraq.

The WPR is important. The central role the WPR plays in the war powers debate shows the high expectations the 1973 Congress held for it. Unfortunately, many argue the WPR has never lived up to those expectations. Make no mistake, the WPR is a flawed document. Some of its sections are contradictory, and critics consider many of its sections unconstitutional, either infringing on the inherent powers of the president or Congress. Its most damning repudiation was from President Nixon, who vetoed it, requiring the 1973 Congress to override his veto. The WPR thus came into being as a law which defines the scope of a president's war authority, but was never signed into law by a president. As a result, many, including nearly every president since 1973, feel it lacks legitimacy. Nevertheless, it is the law of the land, and every president and Congress must abide by its requirements.

In my thesis, I analyze the constitutionality and effectiveness (both historic and future) of the WPR. Critics of the WPR fall into two primary groups: those that favor more authority for the executive branch and those that favor more for Congress. Within these groups, calls for WPR reforms can vary from minor changes to outright repeal. There is also a smaller, third group: those that believe the WPR has helped to create a

framework within which presidents and Congresses have worked together to define the scale and scope of U.S. military conflicts in the post-1973 era. After reviewing the history of the WPR and its impact on conflicts during this period, I agree with those who claim the WPR, while an imperfect document, is constitutional, has made a difference, and helped to curtail unilateral presidential war.

My first chapter analyzes the constitutionality of the WPR. I first provide a legislative history of the law, which took place between 1969 and 1973. The Senate and House of Representatives wanted to accomplish different purposes in a war powers law. I discuss how the two chambers reconciled their differences, and then were able to override President Nixon's veto. I then discuss the controversial sections of the law and the various criticisms leveled against them. In the last part of the chapter, I review the current body of applicable court cases which help define the extent of each branch's war power authority.

My second chapter reviews the effectiveness of the WPR since 1973. I analyze eleven major cases during this period: The 1975 Mayaguez Incident; Lebanon (1982-1984); Grenada (1983); Panama (1989-1990); the 1991 Persian Gulf War; Somalia (1992-1994); Haiti (1993-1994); Yugoslavia (1992-1999); The War on Terror (2001-present); the 2011 Libyan Air Campaign; and Syria (2013-present). I look at how the presidents and Congresses utilized the WPR during these conflicts. I also discuss instances in which members of Congress took the president to court during these events and how their rulings impacted the WPR. The last part of this chapter studies the 1997 study by political scientists David Auerswald and Peter Cowhey who performed an empirical analysis of the effectiveness of the WPR between 1973 and 1995. I review the

results of their study and use their research parameters to analyze U.S. military operations subsequent to 1995.

My third chapter analyzes prospects for the WPR's future effectiveness. I review the significant attempts at WPR reform or repeal, and why in every case they failed. I then look at the WPR's effectiveness in modern warfare. The WPR's trigger is the deployment of U.S. military personnel into hostile environments. As a result, is the WPR applicable to covert operations and operations using advanced weapons such as drones and cyberwarfare, where U.S. military personnel are not in immediate danger? This requires me to also review the relevant laws of the intelligence community. Finally, I review the contemporary WPR interpretations of both the executive and legislative branches, and how their behaviors determine its effectiveness both presently and in the future.

As I first stated, the decision to take the nation to war is arguably the most important decision any president or Congress can make. It is a decision no individual should take lightly. The vagueness of the Constitution's delegation of war powers between the president and Congress leaves room for a wide range of interpretations by both branches. The WPR was an attempt to help guide both branches through this process. It is not perfect, but I believe it has helped ensure both branches appropriately participate in the decision to go to war. My hope is my research will contribute to our understanding of how the U.S. views the decision to go to war through the lens of the WPR, as well as how the Constitution delegates war powers between the branches.

Chapter 1

The War Powers Resolution – A Legislative History and Analysis of its Constitutionality

Introduction

In this chapter, I analyze whether the WPR is a constitutional piece of legislation. In order to reach a conclusion, I discuss the origins and legislative history of the WPR, analyze the controversial aspects of the legislation that those in favor and against have raised, and review how the courts have ruled in cases related to presidential and congressional war powers. In conclusion, I believe the WPR is constitutional, and if used properly, can be a useful framework through which to ensure the constitutional prerogatives of both the legislative and executive branches are considered in war powers matters.

Part I – The Origins and Drafting of the War Powers Resolution

A. The Legislative History of the War Powers Resolution

In order to properly analyze the WPR, it is important to first understand its legislative origins in Congress. The WPR originated and evolved in Congress during the four years prior to its passing in 1973. The two chambers of Congress originally had different goals in what war powers legislation should accomplish. Many in Congress still had reservations about the WPR after it became law. In this section, I will discuss these matters and the constitutional questions that arose during this period.

On February 4, 1969, the Senate passed the first congressional resolution to voice protest against the continued expansion of presidential war power. The National

Commitment Resolution stated it was “the sense of the Senate that a national commitment by the United States to a foreign power ... results from affirmative action taken by the executive and legislative branches of the United States.”¹⁰ Although only a one-chamber resolution and not a joint resolution from both chambers of Congress, the Senate hoped its resolution would lay the foundation for increased dialogue between the two branches. The Senate was wrong, and the Nixon administration continued to wage the Vietnam War unilaterally and expanded the war to Cambodia and Laos “without the consent or even the knowledge of Congress.”¹¹

In 1970, members in both chambers of Congress presented the first war powers bills for debate. These bills laid the foundations for the different policy directions both chambers would take in the upcoming years. The Senate bills would favor a curtailment of presidential war power with specific roles for both branches while the House bills preferred a less restrictive, more collaborative approach between the branches.

On June 15, 1970, Republican Senators Jake Javits and Bob Dole co-introduced S. 3964.¹² The bill outlined instances in which a president could enter into hostilities without congressional authorization, a key feature of all future Senate bills. The language of this bill and future Senate bills would attempt to define the president’s war authority as Commander in Chief under Article II of the Constitution. According to S. 3964, presidents could use the armed forces only to repulse attacks against the United States or armed forces, protect the lives and property of U.S. citizens abroad, and comply with legislative authorizations to use force.¹³ The bill also limited presidential actions

¹⁰ S. Res. 85, 91st Congress, 1st Session.

¹¹ S. Rpt. 220, 93rd Congress, 1st Session, page 5.

¹² S. 3964, 91st Congress, 2nd Session, page 1.

¹³ S. 3964, 91st Congress, 2nd Session, pages 1-2.

without congressional authorization to no longer than 30 days, with Congress having the option to terminate hostilities prior to the cutoff through a joint resolution.¹⁴ The definition of the president's war authority and the mandatory termination of hostilities clock would be the key provisions of all future significant war powers legislation in the Senate.

The bill also required the president to report "promptly" to Congress any instances where he commits the armed forces to hostilities and does not have congressional authorization.¹⁵ The term "promptly" was significant because while vague in initial Senate and House legislation, both chambers would begin to tighten presidential reporting requirements in future sessions. The bill also included requirements both chambers would eventually adopt for priority review in order to avoid filibuster attempts or committee pigeonholing.¹⁶ Finally, the bill included language that it would "not apply to military hostilities undertaken before the effective date of this Act" (i.e., it would not apply to Vietnam).¹⁷ The decision whether to make the act applicable to Vietnam would become another major issue of debate as the legislation evolved.

Democratic Congressman Clement Zablocki led a large group of sponsors in introducing the House's first war powers bill on August 13, 1970.¹⁸ As with S. 3964, this bill would lay the foundation of the policy direction the House would pursue. The bill began by stating, "The Congress reaffirms its powers under the Constitution to declare war."¹⁹ It continued by stating the president has powers to defend the country without

¹⁴ S. 3964, 91st Congress, 2nd Session, pages 2-3.

¹⁵ S. 3964, 91st Congress, 2nd Session, page 2.

¹⁶ S. Rpt. 220, 93rd Congress, 1st Session, page 30.

¹⁷ S. 3964, 91st Congress, 2nd Session, page 3.

¹⁸ H. J. Res. 1355, 91st Congress, 2nd Session, page 1.

¹⁹ H. J. Res. 1355, 91st Congress, 2nd Session, page 1.

congressional approval in “certain extraordinary and emergency circumstances.”²⁰

Unlike the Senate, the early House bills would continue to avoid defining the president’s emergency powers out of fear it would infringe “on the President’s Constitutional prerogatives as Commander in Chief.”²¹ The bill also stated it did not alter the authority of Congress or the president; language the House would continue to include in its bills.²²

The heart of the bill was its reporting requirement, which was the centerpiece of all House war powers bills. As with the Senate bill, the House’s first bill used weak language in its reporting requirements such as: “It is the sense of Congress that whenever feasible the President should seek consultation with the Congress before involving the Armed Forces of the United States in Armed Conflict.”²³ If the president already committed U.S. forces into hostilities, it required him to “promptly” report to Congress. This language would leave substantial room for legal interpretation by the executive branch.²⁴ The House’s trigger for congressional reporting included when the president, without congressional authorization, committed U.S. forces into “armed conflict,” committed forces “equipped for combat” to a foreign nation, or “substantially enlarges” forces already in a foreign nation.²⁵ This definition would remain fairly consistent through future House bills and would be an issue of debate with the Senate in future conference committees.

The success of these two bills in their respective chambers of Congress show how far apart in 1970 the House and Senate were on the war powers issue. The House of

²⁰ H. J. Res. 1355, 91st Congress, 2nd Session, page 1.

²¹ H. Rpt. 1547, 91st Congress, 2nd Session, page 4.

²² H. J. Res. 1355, 91st Congress, 2nd Session, page 3.

²³ H. J. Res. 1355, 91st Congress, 2nd Session, pages 1-2.

²⁴ H. J. Res. 1355, 91st Congress, 2nd Session, page 2.

²⁵ H. J. Res. 1355, 91st Congress, 2nd Session, page 2.

Representatives passed Congressman Zablocki's bill overwhelmingly; 289-39 on November 16, 1970.²⁶ In the Senate, Senators Javits and Dole did not have any other public supporters for their bill. Additionally, the Senate did not act on the House's war powers bill allowing it to expire at the end of the session. Nevertheless, Senator Javits and Dole's introduction of the first war powers bill in the Senate, coupled with the success of war powers legislation in the House, raised attention to the subject in the Senate.²⁷

In 1971, both chambers would again attempt to pass war powers legislation. In the Senate, Senator Javits revised his war powers bill from the previous year and resubmitted on February 10, 1971.²⁸ The new bill only had minor revisions over the previous year's bill. Senator Javits' 1971 bill still included the following: an outline of instances in which a president could enter into hostilities without congressional authorization; reporting to Congress all unauthorized military actions; the 30-day mandatory termination for hostilities and joint resolution override; anti-filibuster provisions; and would not apply to military hostilities already undertaken such as Vietnam.²⁹

A trio of war powers bills, written by other senators, accompanied Senator Javits' bill in early 1971. Two of the bills, those by Democratic Senators Thomas Eagleton and John Stennis, were similar in their requirements to that of Senator Javits. Senator Eagleton introduced his war powers bill on February 17, 1971.³⁰ His bill began in a

²⁶ Spong, Jr., William B., "The War Powers Resolution Revisited: Historic Accomplishment or Surrender?" *William and Mary Law Review*, Volume 16, Issue 4 (1975), page 826.

²⁷ Wheeler, Winslow T., *Wastrels of Defense: How Congress Sabotages United States Security*, (Annapolis: Naval Institute Press, 2004).

²⁸ S. 731, 92nd Congress, 1st Session, page 1.

²⁹ S. 731, 92nd Congress, 1st Session, pages 1-3.

³⁰ S. J. Res. 59, 92nd Congress, 1st Session, page 1.

similar fashion to Congressman Zablocki's by reaffirming the constitutional powers of the executive and legislative branches.³¹ As with Senator Javits' bill, Senator Eagleton's bill detailed instances in which a president could initiate hostilities without congressional authorization. The bill also included a 30-day mandatory termination of hostilities, contained anti-filibuster provisions, required prompt reporting of all unauthorized actions, and would not apply to Vietnam.³²

Senator Eagleton's bill introduced two items that would become significant to the future WPR. First, his bill stated that presidents could not infer congressional authorization for hostilities through treaties or appropriations bills.³³ The bill specifically stated the charters of the U.N., North Atlantic Treaty Organization (NATO), and Southeast Asia Collective Defense Treaty did not authorize the president to engage in hostilities without "authorization from both the Senate and House of Representatives."³⁴ Presidents Truman and Nixon had used these treaties as justification for the Korean and Vietnam Wars, respectively. Second, the bill was the first to attempt to define hostilities, a term whose definition the legislative and executive branches would argue over in future military operations subject to the WPR. Senator Eagleton's definition of hostilities included combat operations in foreign nations, deployment of the armed forces in foreign nations where imminent combat is "a reasonable possibility," and assignment of military personnel to accompany foreign regular or irregular forces engaged in hostilities (i.e., similar to the origins of the U.S.' involvement in Vietnam).³⁵

³¹ S. J. Res. 59, 92nd Congress, 1st Session, pages 1-2.

³² S. J. Res. 59, 92nd Congress, 1st Session, pages 1-7.

³³ S. J. Res. 59, 92nd Congress, 1st Session, page 2.

³⁴ S. J. Res. 59, 92nd Congress, 1st Session, pages 2-3.

³⁵ S. J. Res. 59, 92nd Congress, 1st Session, pages 6-7.

Senator Stennis introduced his bill on May 11, 1971.³⁶ This bill was very similar to those of Senators Javits and Eagleton. The bill included the same key language of these bills including an outline of instances in which a president could enter into hostilities without congressional authorization, reporting to Congress all unauthorized military actions, the 30-day mandatory termination for hostilities, and anti-filibuster provisions. Senator Stennis' bill was unique because it attempted to define the president's authority to defend the nation in situations that involved nuclear weapons.³⁷ As with Senator Eagleton's bill, Senator Stennis' stated the president could not infer authorization to initiate hostilities from appropriation bills but did not mention treaties.³⁸ Finally, the bill would not apply to Vietnam, but went further by including to the qualification the countries and waters around Vietnam as the war had spread outside its borders by the early 1970s.³⁹ Democratic Senator Lloyd Bentsen reintroduced this bill with minor drafting changes on May 17, 1971.⁴⁰

Republican Senator Robert Taft, Jr. introduced the fourth war powers bill in the Senate during 1971. Unlike the bills of Senators Javits, Eagleton, and Stennis, Senator Taft's bill focused on defining the president's war powers and clarifying the Congress' position towards operations in Southeast Asia.⁴¹ The bill was significant because it was the first to raise the use of a concurrent versus joint resolution to require the president to end active military operations.⁴² Concurrent resolutions, unlike joint resolutions, do not require presidential signature and do not carry the force of law. The bill was also the first

³⁶ S. J. Res. 95, 92nd Congress, 1st Session, page 1.

³⁷ S. J. Res. 95, 92nd Congress, 1st Session, page 2.

³⁸ S. J. Res. 95, 92nd Congress, 1st Session, page 3.

³⁹ S. J. Res. 95, 92nd Congress, 1st Session, page 5.

⁴⁰ S. 1880, 92nd Congress, 1st Session, page 1.

⁴¹ S. J. Res. 18, 92nd Congress, 1st Session, pages 2-3.

⁴² S. J. Res. 18, 92nd Congress, 1st Session, page 3.

to set a definitive deadline for the president to report unauthorized military deployments; 24 hours in its case.⁴³

The Senate Committee on Foreign Relations held public hearings on the four war powers bills between March and October 1971.⁴⁴ As a result of these hearings, the senators of the initial war powers bills jointly introduced S. 2956 on December 6, 1971.⁴⁵ S. 2956 was a hybrid bill that combined the key themes of the previous 1971 war powers bills.⁴⁶ The bill first reiterated the constitutional war powers of the executive and legislative branches. It then detailed circumstances in which the president could use emergency war powers such as to repel attacks against the U.S. and its armed forces, to protect and rescue citizens in foreign nations, and pursuant to specific legislative authorization.⁴⁷ It did not include Senator Stennis' language about nuclear weapons.

S. 2956 included the 30-day mandatory termination for unauthorized presidential operations with an option for congressional overrides using a joint versus concurrent resolution.⁴⁸ It also included language from Senators Eagleton and Stennis' bills that the president could not infer legislative authorization from treaties or appropriations.⁴⁹ The bill did not include Senator Taft's language for a hard reporting deadline, instead, it stated the president must "promptly" report unauthorized military operations.⁵⁰ It also included anti-filibuster provisions.⁵¹ Finally, the bill would not apply to current military

⁴³ S. J. Res. 18, 92nd Congress, 1st Session, page 3.

⁴⁴ S. Rpt. 220, 93rd Congress, 1st Session, page 5.

⁴⁵ S. 2956, 92nd Congress, 1st Session, page 1.

⁴⁶ S. Rpt. 220, 93rd Congress, 1st Session, page 5.

⁴⁷ S. 2956, 92nd Congress, 1st Session, pages 2-3.

⁴⁸ S. 2956, 92nd Congress, 1st Session, page 5.

⁴⁹ S. 2956, 92nd Congress, 1st Session, page 3.

⁵⁰ S. 2956, 92nd Congress, 1st Session, page 4.

⁵¹ S. 2956, 92nd Congress, 1st Session, pages 5-6.

operations such as Vietnam.⁵² The Committee on Foreign Relations approved the bill and the Senate adopted the bill by the vote of 68-16 on April 13, 1972. The bill would remain the Senate's position on presidential and legislative war powers for the remainder of the war powers debates.

In the House of Representatives during 1971, Congressman Zablocki immediately reintroduced his war powers bill as H. J. Res. 1 at the beginning of the 92nd Congress on January 22, 1971.⁵³ The only change from the previous year's war powers bill was the House removed the term "whenever feasible" from its consultation requirements prior to the president deploying the U.S. armed forces. While at first glance, this appears to strengthen the consultation requirement. However, the committee report stated, "the entire section remains a 'sense of Congress' provision and is thus advisory, rather than mandatory."⁵⁴ The House Foreign Affairs committee unanimously approved the bill and the House again passed the bill on August 2, 1971.⁵⁵

In 1972, efforts in both chambers to move the war powers legislation forward continued to proceed. Both chambers now had their final bills and were ready to move forward through a conference committee. However, there were already significant differences of opinion between the two chambers over the direction of the final legislation based on S. 2956 and H. J. Res. 1. The Senate bill, which detailed time limits and circumstances in which the president could pursue military operations without congressional authorization, was much more specific than the House bill, which focused on presidential reporting requirements. Democratic Senator William Spong, Jr. stated the

⁵² S. 2956, 92nd Congress, 1st Session, page 6.

⁵³ H. J. Res. 1, 92nd Congress, 1st Session, page 1.

⁵⁴ H. Rpt. 383, 92nd Congress, 1st Session, page 2.

⁵⁵ Spong, Jr., William B., "The [WPR] Revisited: Historic Accomplishment or Surrender?" page 826.

Senate thought the House bill too weak while the House thought the Senate's bill too restrictive on the president in emergencies.⁵⁶ As a result of the differences of opinion, the Senate Foreign Relations Committee recommended to the Senate not to pass H. J. Res. 1.⁵⁷

The Senate's rejection of H. J. Res. 1 did not end war powers discussion between the two chambers. On August 3, 1972, Congressman Zablocki, in a crafty legislative move to "overcome a parliamentary impasse," took the Senate's bill into committee, replaced the Senate's language with that of H. J. Res. 1, and recommended its passing to the House as amended.⁵⁸ The House of Representatives overwhelmingly approved the amended Senate bill 345-13 on August 14, 1972.⁵⁹ A conference committee could now debate the war powers legislation. Unfortunately, the members of the conference committee were able to meet only one time before the 1972 elections in what Senator Spong called a "desultory meeting."⁶⁰ As a result, the war powers legislation debates could not continue until the beginning of the 93rd Congress in January 1973.

On January 3, 1973, the House introduced its new war powers bill as H. J. Res. 2. The bill still focused on presidential reporting requirements, although it included sections that detailed the president's emergency war powers and anti-filibuster/pigeonholing provisions.⁶¹ The House Foreign Affairs Committee held new hearings on the bill in March 1973, and introduced the House's strongest bill to date – H. J. Res. 542.⁶² The new bill was closer in tone to that of the Senate. The most significant changes to the

⁵⁶ Spong, Jr., William B., "The [WPR] Revisited: Historic Accomplishment or Surrender?" page 827.

⁵⁷ S. Rpt. 92-755, 92nd Congress, 2nd Session, page 1.

⁵⁸ H. Rpt. 92-1302, 92nd Congress, 2nd Session, pages 1-2.

⁵⁹ 118 Cong. Rec. 28,079-84 (1972).

⁶⁰ Spong, Jr., William B., "The [WPR] Revisited: Historic Accomplishment or Surrender?" page 827.

⁶¹ H. J. Res. 2, 93rd Congress, 1st Session, pages 1-2.

⁶² Spong, Jr., William B., "The [WPR] Revisited: Historic Accomplishment or Surrender?" page 828.

House's bill were the introduction of a 120-day mandatory termination for unauthorized presidential military operations and the use of a concurrent versus joint resolution to force the president to end military operations.⁶³ The bill also used stronger language such as replacing "it is the sense of Congress that the President should seek appropriate consultation" with "the President in every possible instance shall consult" in requiring the president to report to Congress prior to committing U.S. forces to hostilities.⁶⁴ The bill also gave the president had a hard deadline of 72 hours to report unauthorized military operations to Congress. As with the Senate bill, the president could not infer authorization from treaties.⁶⁵ Unlike the Senate bill, the House bill would apply to current operations such as Vietnam.⁶⁶

The House Foreign Affairs Committee reported H. J. Res. 542 to the House on June 15, 1973, and the House voted in favor of the bill 244-170 on July 18, 1973.⁶⁷ The Senate, already satisfied with its bill, had less work to do in early 1973. The Senate reintroduced its bill as S. 440 on January 18, 1973. The only significant revision to the Senate bill was an amendment in June to make Vietnam subject to the resolution.⁶⁸ Both chambers now agreed Vietnam would be subject to any war powers legislation they passed. However, this was a moot point by this time as the U.S.' direct role in Vietnam was ending in 1973. The Senate subsequently referred its bill to the House on July 23, 1973.⁶⁹ As the bills of the two chambers were now much more similar, there was a

⁶³ H. J. Res. 542, 93rd Congress, 1st Session, pages 3-4.

⁶⁴ H. J. Res. 1, 92nd Congress, 1st Session, page 1, and H. J. Res. 542, 93rd Congress, 1st Session, page 1.

⁶⁵ H. Rpt. 93-287, 93rd Congress, 1st Session, page 1, and H. J. Res. 542, 93rd Congress, 1st Session, page 6.

⁶⁶ H. J. Res. 542, 93rd Congress, 1st Session, page 6.

⁶⁷ Spong, Jr., William B., "The [WPR] Revisited: Historic Accomplishment or Surrender?" page 828.

⁶⁸ S. Rpt. 220, 93rd Congress, 1st Session, page 37, and Spong, Jr., William B., "The [WPR] Revisited: Historic Accomplishment or Surrender?" page 831.

⁶⁹ S. 440, 93rd Congress, 1st Session.

higher probability that the current Congress' conference committee would be able to reach an agreement on the legislation.

Both chambers in their respective reports elaborated on the policies within their final bills. The House report emphasized “harmony,” “balance,” and “consultation.”⁷⁰ The intent of the House bill “was not to reflect criticisms on activities of Presidents, past or present,” but to draft guidelines for both branches to fulfill their constitutional responsibilities.⁷¹ The Senate report was more partisan than that of the House. Instead of a more collaborate approach, the report stated the bill’s purpose was to “reconfirm and to define with precision the constitutional authority of Congress to exercise its constitutional war powers with respect to ‘undeclared’ wars.”⁷² One can easily surmise the goals of both chambers from the tone of their reports.

The arrival of the two bills to conference committee also marked a low point in the Nixon presidency. President Nixon had recently ordered unpopular airstrikes in Cambodia to entice the North Vietnamese to withdraw from that country.⁷³ The Watergate scandal was continuing to unfold in the media further damaging the president’s popularity.⁷⁴ In a sense, it had become a perfect moment politically for Congress to attempt to pass major legislation that would curtail the powers of the executive branch.

On October 4, 1973, the conference committee approved the final version of the WPR bill.⁷⁵ The bill was a true combination of both the Senate’s S. 440 and the House’s

⁷⁰ H. Rpt. 93-287, 93rd Congress, 1st Session, pages 4-5.

⁷¹ H. Rpt. 93-287, 93rd Congress, 1st Session, page 4.

⁷² S. Rpt. 220, 93rd Congress, 1st Session, page 2.

⁷³ Spong, Jr., William B., “The [WPR] Revisited: Historic Accomplishment or Surrender?” page 830.

⁷⁴ Spong, Jr., William B., “The [WPR] Revisited: Historic Accomplishment or Surrender?” pages 830-831.

⁷⁵ H. Rpt. 93-547, 93rd Congress, 1st Session, page 1.

H. J. Res. 542. It defined the president's emergency war powers, the constitutional authority for both branches, and included a separability clause as the Senate desired. It also included the reporting requirements and use of a concurrent resolution to terminate unauthorized presidential military operations prior to the cutoff date as the House desired. Both chambers compromised on their cutoff dates for unauthorized military operations, which became 60 days with an automatic 30-day extension if the president deemed a withdrawal after 60 days would endanger the safety of U.S. armed forces.⁷⁶

Although the two chambers of Congress had passed a final war powers bill, some congressmen had already raised concerns regarding the constitutionality of some of the key provisions of the future WPR. In June 1973, eleven representatives affixed their minority views to H. J. Res 542. Their major criticisms of the bill included the automatic termination of hostilities provision and ability to terminate hostilities via concurrent resolution. The members questioned the constitutionality of forcing a president to terminate military operations through congressional inaction.⁷⁷ They also believed this could place U.S. forces at risk by forcing their withdrawal in the midst of combat.⁷⁸ In place, several of the congressmen recommended requiring Congress to hold a vote to authorize a president's military operations by the end of the specified period.⁷⁹ The congressmen also questioned the constitutionality of Congress' use of a concurrent resolution to override a president, specifically, would a concurrent resolution be binding on a president, and would it challenge his constitutional authority as Commander in

⁷⁶ Auerswald, David P. and Peter F. Cowhey. "Ballotbox Diplomacy: The War Powers Resolution and the Use of Force." *International Studies Quarterly*, Volume 41, No. 3 (1997), page 516.

⁷⁷ H. Rpt. 93-287, 93rd Congress, 1st Session, pages 15, 17, 19-20.

⁷⁸ H. Rpt. 93-287, 93rd Congress, 1st Session, pages 15 and 19.

⁷⁹ H. Rpt. 93-287, 93rd Congress, 1st Session, page 17.

Chief?⁸⁰ Although minority views, they raised constitutional questions that haunt the WPR to the present day. I will discuss the constitutional questions over the WPR in the next section of this chapter.

Both chambers overwhelming approved the final bill. The Senate approved the compromise on October 10, 1973 with a vote of 75-20. The House approved it on October 12, 1973 with a vote of 238-123.⁸¹ The bill was now on the desk of President Nixon.

On October 25, 1973, President Nixon vetoed the WPR bill and stated, “The restrictions which this resolution would impose upon the authority of the President are both unconstitutional and dangerous to the best interests of our Nation.”⁸² The president further stated the Founding Fathers intentionally did not specify the war powers of the executive and legislative branches in order to promote flexibility and “close cooperation.”⁸³ President Nixon, like the congressman who affixed their minority views to H. J. Res. 542, believed the WPR provisions for the automatic termination of hostilities after 60 days and use of a concurrent resolution to terminate presidential military actions were unconstitutional. For the former, he stated it would “seriously undermine this Nation’s ability to act decisively ... in times of crisis,” and would allow Congress “to increase its policy-making role through a provision which requires it to take absolutely no action at all.”⁸⁴ For the latter, a concurrent resolution was “an action which does not normally carry the force of law.”⁸⁵ President Nixon returned the bill to Congress only

⁸⁰ H. Rpt. 93-287, 93rd Congress, 1st Session, pages 15-16, 20.

⁸¹ Spong, Jr., William B., “The [WPR] Revisited: Historic Accomplishment or Surrender?” page 835.

⁸² H. R. Doc. 93-171, page 1.

⁸³ H. R. Doc. 93-171, page 1.

⁸⁴ H. R. Doc. 93-171, pages 1, 2.

⁸⁵ H. R. Doc. 93-171, page 1.

welcoming more inter-branch consultation and a non-partisan commission to study the roles of the branches in foreign affairs.⁸⁶

Congress anticipated President Nixon would veto any WPR bill that contained conditions beyond a reporting requirement.⁸⁷ The Democratic Party controlled both chambers of Congress at this time. While the Senate had enough votes to override President Nixon's veto, slightly less than two-thirds of the House had voted in favor of the WPR bill. However, two events helped to bring the House vote total above the two-thirds necessary to override President Nixon's veto. The first was legislative history. President Nixon had already vetoed the 93rd Congress eight times. Many members in Congress saw an override of President Nixon's veto of the WPR as a means for Congress to reassert itself.⁸⁸ The second was Watergate. President Nixon had requested the Justice Department to remove independent special prosecutor Archibald Cox from the Watergate investigation four days before his veto of the WPR. The refusals and subsequent resignations of Nixon's Attorney General and Deputy Attorney General became known as the Saturday Night Massacre leaving many in Congress infuriated.⁸⁹ As a result of the growing anger towards the Nixon Administration, both chambers garnered enough votes to override the president's veto – 75-18 in the Senate and 284-135 in the House.⁹⁰ The WPR became law as P.L. 98-148 on November 7, 1973 (see Appendix 1).

Although both chambers of Congress overwhelmingly voted for the WPR, the reactions to its passing were mixed. Many members felt instead of contracting

⁸⁶ H. R. Doc. 93-171, pages 1, 3.

⁸⁷ Spong, Jr., William B., "The [WPR] Revisited: Historic Accomplishment or Surrender?" page 835.

⁸⁸ Gray, David and Louis Fisher, "The War Powers Resolution: Time to Say Goodbye," *Political Science Quarterly*, Volume 113, No. 1 (1998), page 4.

⁸⁹ Gray, David and Louis Fisher, "The [WPR], Time to Say Goodbye," pages 4-5.

⁹⁰ Gray, David and Louis Fisher, "The [WPR], Time to Say Goodbye," page 4.

presidential power, it expanded it by giving presidents 60 to 90 days to conduct military operations without congressional authorization.⁹¹ Some members of Congress viewed it as a judgment on President Nixon's administration. Democratic Congresswoman Bella Abzug voted against the bill in the House and in conference believing it gave the presidency too much power, but voted for the veto override stating, "this could be a turning point in the struggle to control an administration that has run amuck. It could accelerate the demand for the impeachment of the President."⁹²

Other Congressmen were not as supportive of the WPR. Democratic Congressman Ronald Dellums, who never voted in favor of the bill, warned Congress that "Richard Nixon is not going to be President forever. Although many people will regard this as a victory against the incumbent President, because of his opposition, I am convinced that it will actually strengthen the position of future Presidents."⁹³ Even Senator Eagleton, one of the sponsors of the Senate bill, was unhappy with the final WPR product and voted against the veto override.⁹⁴ He stated of the conference version of the WPR that "what came out is a total, complete distortion of the war powers concept."⁹⁵ The Senator continued stating that by allowing the president to wage unrestricted military operations for 60 to 90 days, the final version of the WPR "was the most dangerous piece of legislation that I have seen."⁹⁶

The WPR was controversial legislation from its enactment. Many members of Congress have questioned the WPR's constitutionality and effectiveness, which I will

⁹¹ Gray, David and Louis Fisher, "The [WPR], Time to Say Goodbye," page 5.

⁹² Gray, David and Louis Fisher, "The [WPR], Time to Say Goodbye," page 4.

⁹³ Gray, David and Louis Fisher, "The [WPR], Time to Say Goodbye," page 5.

⁹⁴ 119 Cong. Rec. 36176 (1973).

⁹⁵ 119 Cong. Rec. 36177 (1973).

⁹⁶ 119 Cong. Rec. 36178 (1973).

discuss in Part II of this chapter, as well as in later chapters. Since 1973, members of Congress have attempted to amend or repeal the WPR on multiple occasions. I discuss the potential amendments and repeal attempts on the WPR in Chapter 3. In 1983, Congress contemplated modifying the WPR's concurrent resolution provision in the wake of the Supreme Court's ruling in *Immigration and Naturalization Service versus Chadha*. I will discuss this issue in more detail in Part II of this chapter.

Congress drafted the WPR out of a need to rebalance the powers of the executive and legislative branches in taking the country to war. Many members of Congress were still unsatisfied with the conference version with some questioning its constitutionality. President Nixon's veto of the legislation calling it unconstitutional and later congressional attempts to amend or repeal the WPR are further evidence of its controversy. Nevertheless, the WPR is still the law of the land. In the upcoming sections, I will discuss the controversial sections of the WPR and analyze its constitutionality based on judicial history.

Part II – An Analysis of the Constitutionality of the War Powers Resolution

A. What the Founding Fathers Foresaw for War Powers

The Constitution gives Congress the definitive authority to declare war under Article I, Section 8.⁹⁷ However, between outright war and a president's emergency

⁹⁷ Article I, Section 8 states Congress has the power, "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress," Rossiter, Clinton, ed., *The Federalist Papers, The Constitution*, New York: Penguin, 1999, page 547.

powers to defend the nation as Commander in Chief under Article II, Section 2 of the Constitution is what Supreme Court Justice Robert Jackson called a “zone of twilight.”⁹⁸ Presidents and their legal advisors have worked to expand this “zone” to further empower the executive branch. However, historical records show the Founding Fathers were very clear in placing the power to take the nation to war with the legislative branch, not the executive.

Future president James Madison of Virginia was against empowering the president with the ability to go to war – “Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued or concluded.”⁹⁹ James Wilson of Pennsylvania stated, “the important power of declaring war is vested in the legislature at large.”¹⁰⁰ His peer, Roger Sherman of Massachusetts, further elaborated on the delegation of war powers by stating, “The Executive shd [sic.] be able to repel and not to commence war.”¹⁰¹ Constitutional convention records indicate the founders used the term “declare war” in place of “make war” only to allow the president to “repel sudden attacks.”¹⁰² Furthermore, the term “declare” had a different definition in 18th century America. In that era, declare was synonymous with commence, and international and English law at the time used the words interchangeably.¹⁰³

⁹⁸ Article II, Section 2 states, “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States,” Rossiter, Clinton, ed., *The Federalist Papers, The Constitution*, page 551, and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁹⁹ Spong, Jr., William B., “The [WPR] Revisited: Historic Accomplishment or Surrender?” page 843.

¹⁰⁰ Treanor, William M., “The War Powers Outside the Courts.” *Indiana Law Journal*, 81 Ind. L.J. 1333 (2005), page 5.

¹⁰¹ Fisher, Louis. “Basic Principles of the War Power,” *Journal of National Security Law and Policy*, Volume 5:319 (2012), page 321.

¹⁰² S. Rpt. 606, 92nd Congress, 2nd Session, pages 12-13.

¹⁰³ Gray, David and Louis Fisher, “The [WPR], Time to Say Goodbye,” page 9.

The Federalist Papers, written to support the ratification of the Constitution, only lightly addressed war powers. However, they reiterated the Founding Fathers' desire to take the authority to declare war out of the hands of a single person, such as the king of England, and place it in the hands of the people. John Jay wrote of the selfish interests of monarchs in taking nations to war:

*"Absolute monarchs will often make war when their nations are to get nothing by it, but for the purposes and objects merely personal, such as thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans."*¹⁰⁴

James Madison wrote of permanent, standing armies as a necessary evil for national self-preservation. Madison believed standing armies "[planted] in the Constitution itself necessary usurpations of power."¹⁰⁵ As a result, Madison wrote republics such as the U.S. "must take corresponding precautions" to counter the risks of maintaining standing armies, such as separating war powers between the president and Congress.¹⁰⁶

Alexander Hamilton wrote about war powers from the perspective of the president. He argued "the energy of the Executive is the bulwark of the national security."¹⁰⁷ He further stated the slow, deliberative nature of Congress balances against the energy of the executive to "constitute safety in a republican sense."¹⁰⁸ While Hamilton promoted energy in the executive as "a leading character in the definition of good government," he also tried to assure the public that the new position of the president would not be as powerful as the king of England, particularly in war powers:

"The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the

¹⁰⁴ Rossiter, Clinton, ed., *The Federalist Papers*, *Federalist No. 4*, page 40.

¹⁰⁵ Rossiter, Clinton, ed., *The Federalist Papers*, *Federalist No. 41*, page 253.

¹⁰⁶ Rossiter, Clinton, ed., *The Federalist Papers*, *Federalist No. 41*, page 253.

¹⁰⁷ Rossiter, Clinton, ed., *The Federalist Papers*, *Federalist No. 70*, page 425.

¹⁰⁸ Rossiter, Clinton, ed., *The Federalist Papers*, *Federalist No. 70*, page 422.

DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.”¹⁰⁹

The writings of Jay, Madison, and Hamilton in *The Federalist Papers* showed the Founding Fathers recognized the potential for creating a tyrant in the new U.S. government. As such, they built in controls to the new Constitution to prevent the accumulation of too much power in any branch, such as separating the war powers between the president and Congress. It is clear that at this point in American history, the Constitution intended for Congress to have the sole authority to take the nation to war.

Alexander Hamilton and James Madison would further debate the scope of the president and Congress’ inherent and shared powers, including those related to war, during George Washington’s presidential administration. At this time, Alexander Hamilton was one of Washington’s closest advisors as his Secretary of the Treasury, while James Madison was a member of the House of Representatives. Both would argue in favor of their respective branches in a series of essays that would become known as the *Pacificus-Helvidius Debates*.

In April 1793, President Washington announced to the nation the U.S. would remain neutral during the war between France and an alliance of European states. President Washington’s decision was controversial because the U.S. had a mutual defense treaty with France. The controversy over the proclamation quickly grew beyond whether the U.S. was violating its treaty with France to a wider debate about the separation of powers between the presidency and Congress, particularly in foreign affairs, which at this time were still undefined.¹¹⁰ Hamilton and Madison wrote a series of essays

¹⁰⁹ Rossiter, Clinton, ed., *The Federalist Papers*, *Federalist No. 70*, page 421 and *Federalist No. 69*, page 416.

¹¹⁰ Frisch, Morton J., ed., *The Pacificus-Helvidius Debates of 1793-1794: Toward the Completion of the American Founding*, Indianapolis: Liberty Fund, Inc., 2007, vii.

arguing their positions under the pen names Pacificus and Helvidius, respectively, between June and September 1793.

Hamilton argued in favor of a broad interpretation of the president's power in foreign affairs under the general grant of executive authority in Article II of the Constitution. He argued, "The Legislative Department is not the organ of intercourse between the [U.S.] and foreign Nations."¹¹¹ His most ambitious assertion in favor of a strong executive branch was the president's executive authority was absolute, with the exception of only three qualifications: the Senate's ability to participate in appointing officers and making treaties, and Congress' authority to declare war.¹¹² Hamilton then marginalized in Congress' authority to declare war by stating all foreign affairs authority up to, and immediately after, a congressional declaration of war rested with the president.¹¹³

While Hamilton's assertions may sound reasonable to contemporary Americans who have lived entirely in an era of strong, executive authority, opponents to Hamilton's agenda, such as Washington's Secretary of State Thomas Jefferson, believed Hamilton was using the neutrality proclamation to expand the power of the executive branch in foreign affairs, something Jefferson strongly opposed.¹¹⁴ Jefferson urged his political ally and friend James Madison counter Hamilton in an entertaining example of eighteenth century political commentary – "For god's sake, my dear Sir, take up your pen, select the most striking heresies, and cut him to [pieces] in the face of the public."¹¹⁵

¹¹¹ Frisch, Morton J., ed., *The Pacificus-Helvidius Debates of 1793-1794, Pacificus I*, 11.

¹¹² Frisch, Morton J., ed., *The Pacificus-Helvidius Debates of 1793-1794, Pacificus I*, 13.

¹¹³ Frisch, Morton J., ed., *The Pacificus-Helvidius Debates of 1793-1794, Pacificus I*, 16.

¹¹⁴ Frisch, Morton J., ed., *The Pacificus-Helvidius Debates of 1793-1794*, viii.

¹¹⁵ Frisch, Morton J., ed., *The Pacificus-Helvidius Debates of 1793-1794, Thomas Jefferson to James Madison, July 7, 1793*, 54.

Madison's strategy to counter Hamilton's assertions was to turn the neutrality proclamation on its head by claiming that when the Washington Administration proclaimed neutrality, it actually infringed on Congress' inherent constitutional authority to declare war. In Madison's words:

*"In exercising the Constitutional power of deciding a question of war, the Legislature ought to be as free to decide, according to its own sense of the public good, on one side as on the other side. Had the Proclamation prejudged the question on either side, and proclaimed its decision to the world; the Legislature, instead of being as free as it ought, might be thrown under the dilemma, of either sacrificing its judgment to that of the Executive; or by opposing the Executive judgment, of producing a relation between the two departments, extremely delicate among ourselves, and of the worst influence on the national character and interests abroad."*¹¹⁶

Madison, like many others skeptical of a strong executive branch, felt war was "the true nurse of executive aggrandizement."¹¹⁷ Even a congressional concession on the power to declare neutrality could strengthen the presidency beyond the powers which the Constitution granted him, creating a tyrant. Hamilton's vision for the executive branch won out in the end. The *Pacificus-Helvidius Debates* helped entrench foreign policy as a primarily executive power, expand the reach of the president's general executive powers under Article II of the Constitution, and recognize "overlapping spheres of power" between the branches.¹¹⁸ The debate also exposed and foreshadowed the complexities in defining war powers boundaries between Congress and the president.

Why have war powers been so controversial if the Founding Fathers were so clear in assigning the power to take the nation to war to the legislative branch? The vague manner in which the Constitution defines both branch's war powers allows both to develop legal positions in their favor. Presidents have unilaterally undertaken military actions and justified them under the Constitution through their powers as Commander in

¹¹⁶ Frisch, Morton J., ed., *The Pacificus-Helvidius Debates of 1793-1794, Helvidius V*, 93.

¹¹⁷ Frisch, Morton J., ed., *The Pacificus-Helvidius Debates of 1793-1794, Helvidius IV*, 87.

¹¹⁸ Frisch, Morton J., ed., *The Pacificus-Helvidius Debates of 1793-1794*, xiv.

Chief and in accordance with the oath of office, in which they swear to “preserve, protect and defend the Constitution of the United States.”¹¹⁹ Congress hoped the WPR would better define the war making roles of both branches. In the words of Senator Spong, “the purpose of the Resolution accepted was not to define constitutional powers, but to establish procedures governing their exercise.”¹²⁰ While Congress may have had these intentions, the WPR has raised many constitutional questions. I will now analyze the controversial sections of the WPR and evaluate its constitutionality based on judicial history.

B. Controversial Sections of the WPR

1. Analysis of Section 2

Section 2 is the Purpose and Policy section of the WPR. Part (a) of the section states the “collective judgement” of both branches will apply to deploying the U.S. military into hostilities. Part (b) cites Congress’ powers under Article 1, Section 8 to make all laws necessary and proper for carrying into execution all powers of the U.S. government. Part (c) is the most controversial part of the section, in which it states the president’s ability to introduce the U.S. military into hostilities are pursuant to “(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”¹²¹ Many opponents of the WPR believe part (c) to be unconstitutional because it infringes on the president’s authority as Commander in Chief in accordance with Article II, Section 2 of the Constitution. However, as I will discuss in the judicial section

¹¹⁹ Rossiter, Clinton, ed., *The Federalist Papers, The Constitution*, page 551.

¹²⁰ Spong, Jr., William B., “The [WPR] Revisited: Historic Accomplishment or Surrender?” page 841.

¹²¹ Public Law 93-148, page 1 (see Appendix 1).

below, the courts have never ruled in favor of a president to initiate hostilities in situations other than those of a defensive or emergency nature, which supports the 2(c) language.

Defining circumstances in which the president could initiate hostilities had been one of the centerpieces of all Senate war powers legislation in the early 1970s. The Senate's intent was to contradict the "executive prerogative which holds that the President may use the armed forces at will, even in conditions falling short of a national emergency."¹²² The Senate claimed the Founding Fathers' intent was for the power to authorize all hostilities to be with Congress.¹²³ Thus, it was the Senate's opinion that all along the founders intended for Congress, not the president, to make war aside from repelling attacks.

As I discussed in Part I of this chapter, the House of Representatives was not as hawkish as the Senate to constrain the president's emergency powers. Many in the House believed the Founding Fathers did not specifically define the war making powers for both branches in order to maintain flexibility in emergencies.¹²⁴ The House never attempted to define the president's emergency powers in its bills. As a result, when the two chambers met in conference committee in 1973, the House members twice rejected Senate attempts to define presidential emergency war powers.¹²⁵

The Senate was extremely disappointed with the final version of this language in the WPR. Senator Eagleton criticized the language because the conference committee

¹²² S. Rpt. 606, 92nd Congress, 2nd Session, page 12.

¹²³ S. Rpt. 606, 92nd Congress, 2nd Session, page 12.

¹²⁴ H. Rpt. 93-287, 93rd Congress, 1st Session, page 18.

¹²⁵ Spong, Jr., William B., "The [WPR] Revisited: Historic Accomplishment or Surrender?" page 13.

placed it in the Purpose and Policy Section, in his opinion rendering it meaningless.¹²⁶ He felt the statement was non-operative which would allow the president to define his own war powers.¹²⁷ Senator Eagleton was correct as the final conference report stated “subsequent sections of the joint resolution are not dependent upon the language of this subsection, as was the case with a similar provision in the Senate bill.”¹²⁸

From a legal standpoint, while Section 2(c) may not apply to other sections of the WPR, it may still may be enforceable. Senator Spong believed the section was not part of the preamble, but part of the body of the resolution, meaning it “must be interpreted together with all other sections” according to statutory construction.¹²⁹ Nevertheless, he stated the final language used in Section 2(c) neither directs the president nor includes consequences for failing to adhere to the language.¹³⁰ As a result, while Senator Spong believed the language to be operative, “its effectiveness [was] limited to the advisory impact it may have upon a President.” He concluded by saying Section 2(c) “must be viewed as the remnant of the Senate's long effort to define the President's war powers in emergency situations. That effort failed.”¹³¹

Section 2(c), while controversial to some, is unlikely to cause any constitutional problems. The final language in the WPR is vague and is not directive upon the president. Additionally, it is questionable whether it applies to the later sections of the WPR that place requirements upon the president (such as Sections 3, 4, 5, and 8).

¹²⁶ Spong, Jr., William B., “The [WPR] Revisited: Historic Accomplishment or Surrender?” page 13.

¹²⁷ 119 Cong. Rec. S. 18,993 as cited in Spong, Jr., William B., “The [WPR] Revisited: Historic Accomplishment or Surrender?” pages 13-14.

¹²⁸ H. Rpt. 93-547, 93rd Congress, 1st Session, page 8.

¹²⁹ Spong, Jr., William B., “The [WPR] Revisited: Historic Accomplishment or Surrender?” page 16.

¹³⁰ Spong, Jr., William B., “The [WPR] Revisited: Historic Accomplishment or Surrender?” page 839.

¹³¹ Spong, Jr., William B., “The [WPR] Revisited: Historic Accomplishment or Surrender?” page 840.

2. Analysis of Section 3

Section 3 is the consultation requirement of the WPR, which originated in the House. Unlike Section 2(c), Section 3 places a direct requirement upon the president. Using the language “the President in every possible instance shall,” Section 3 requires the president to “consult” with Congress prior to introducing the U.S. military into “hostilities” or “imminent hostilities.”¹³² While the language of Section 3 is simple, and even President Nixon showed openness to a consultation requirement in his veto, the section is still controversial.¹³³

Although the section places a direct order upon the presidency, presidents and their legal teams have been able to pick apart to their advantage the terminology of this section. First, the term “every possible instance” has allowed presidents to cite instances where they were unable to report to Congress prior to introducing U.S. forces into hostilities.¹³⁴ Second, the terms “consult” and “hostilities” are not specific. Congress defined consult to mean the president is engaged with the Congress asking for its “advice,” “opinions,” and in some cases “approval” on military matters.¹³⁵ Congress was specific that consult meant more than having the president inform it of pending operations.¹³⁶ However, presidents have tended to define consultation as informing only, and oftentimes after the fact.¹³⁷ The House defined hostilities in its bill to mean where “fighting has actually begun” or “where there is a clear and present danger of armed

¹³² Public Law 93-148, page 1 (see Appendix 1).

¹³³ H. R. Doc. 93-171, page 3.

¹³⁴ Burgin, Eileen, “Congress, the War Powers Resolution, & the Invasion of Panama,” *Polity*, Volume 25, No. 2 (1992), page 221.

¹³⁵ H. Rpt. 93-287, 93rd Congress, 1st Session, pages 6-7.

¹³⁶ H. Rpt. 93-287, 93rd Congress, 1st Session, page 6.

¹³⁷ Gray, David and Louis Fisher, “The [WPR], Time to Say Goodbye,” page 3.

conflict.”¹³⁸ Nevertheless, presidents have often defined hostilities and imminent hostilities liberally resulting in many situations where they have questioned the applicability of the WPR to particular military operations.¹³⁹

There are also questions about the constitutionality of Section 3. Many believe the section to be unconstitutional because it infers presidents will conduct military operations without congressional approval. As a result, these critics claim Section 3 illegally delegates the power to declare war from Congress to the president.¹⁴⁰

Section 3 raises both legal and constitutional issues. Because the Congress enacted the WPR into law, presidents must abide by it, regardless if a president did not sign it into law. The liberal interpretation of Section 3 terminology by presidents raises additional legal questions. While some critics claim the section illegally delegates power to the presidents, presidents have also claimed this and other sections of the WPR infringe on their authority as Commander in Chief. The issues related to interpretation and compliance in Section 3 are examples of problems with the WPR as a piece of legislation.

3. Analysis of Sections 4 and 5

Sections 4 and 5 of the WPR are closely related. Section 4 is the WPR’s reporting requirement. Section 4(a) requires the president to report to Congress when he introduces troops without a declaration of war into certain scenarios. Section 4(a)(1) is the most important scenario (as will be discussed later), and requires the president to

¹³⁸ H. Rpt. 93-287, 93rd Congress, 1st Session, page 7.

¹³⁹ Burgin, Eileen, “Congress, the War Powers Resolution, & the Invasion of Panama,” page 221.

¹⁴⁰ Gray, David and Louis Fisher, “The [WPR], Time to Say Goodbye,” page 3.

report when he has introduced troops into hostilities or imminent hostilities.¹⁴¹ The section requires the president to report to Congress within 48 hours and provide enough information in order for Congress to fulfill its constitutional responsibilities. The president must continue to report regularly until he has removed U.S. forces from the specific situation. One scholar criticizes Section 4 for delegating war authority in direct contradiction of Section 2(c).¹⁴² While his criticism is valid, Section 2(c) is not directive upon the president as I discussed above. Therefore, the Section 2/Section 4 contradiction is an example of sloppiness in the language of the WPR, but does not impact its guidelines.

Section 5 is the WPR's congressional action requirement and the most controversial section of the legislation. If the president submits his report subject to Section 4(a)(1) (note the president, not Congress, determines whether the report is subject to the section), the WPR requires the president to terminate the operation within 60 days unless Congress: 1) declares war or authorizes the operation; 2) extends the operation for another 60 days; or 3) was unable to meet during the 60 days due to an attack against the United States (note Congress does not have to vote in order to trigger the termination of an operation).¹⁴³ Furthermore, the WPR authorizes the president to extend the operation by 30 days if he certifies to Congress that removal after 60 days would jeopardize the safety of U.S. forces. Section 5(c) of the WPR entitles Congress to direct the president to withdraw the U.S. forces at any time by concurrent resolution.¹⁴⁴

¹⁴¹ Public Law 93-148, page 1 (see Appendix 1).

¹⁴² Fisher, Louis, *Presidential War Power, Second Edition, Revised*, (Lawrence: University of Kansas Press, 2004), page 149.

¹⁴³ Public Law 93-148, page 2 (see Appendix 1).

¹⁴⁴ Public Law 93-148, page 2 (see Appendix 1).

As with Section 3, Sections 4 and 5 refer to hostilities but do not define them. The term hostilities is even more critical to Sections 4 and 5 as the president must report under Section 4(a)(1), which relates to hostilities and imminent hostilities, in order to activate the 60-day clock for automatic terminations of hostilities in Section 5(b). Presidents have been reluctant to report under Section 4(a)(1) in order to avoid the clock, which has become a major loophole in the legislation.¹⁴⁵ If the president does not report under this section, Congress would be left to assemble a veto-proof majority in order to activate the 60-day clock by law.¹⁴⁶ As a result, the WPR would be hard to enforce in a “contentious political environment.”¹⁴⁷ This results in the largest weakness of the WPR: Congress assumed presidents would willingly report actual or imminent hostilities under Section 4(a)(1).

Senator Javits considered Section 5 of the WPR to be its “structural heart.”¹⁴⁸ It is also the most controversial piece of the WPR. From Congress’ perspective, some critics believe Section 5 illegally delegates the ability to declare war for up to 90 days to the president, effectively giving him a carte blanche to introduce the military anywhere in the world for any reason.¹⁴⁹ From the president’s perspective, critics worried the automatic termination of hostilities infringed on the president’s constitutional authority as

¹⁴⁵ Grimmer, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” *Congressional Research Service*, R42699 (2012), page 9.

¹⁴⁶ Auerwald, David P. and Peter F. Cowhey. “Ballotbox Diplomacy: The [WPR] and the Use of Force,” page 9.

¹⁴⁷ Ford, Christopher A., “War Powers as we live them: Congressional-Executive Bargaining under the Shadow of the War Powers Resolution,” *Journal of Law & Politics*, Volume 11 (1995), page 2.

¹⁴⁸ The expression from War Powers framer Jacob Javits (Rep, NY). See his Testimony, March 7, 1973, War Powers, Hearings. Stk. No. 5270-01819, House of Representatives, 93rd Congress, 1st Session, 1973, page 4, as stated in Nathan, James A., “Salvaging the War Powers Resolution,” *Presidential Studies Quarterly*, Volume 23, No. 2 (1993), page 250.

¹⁴⁹ Gray, David and Louis Fisher, “The [WPR], Time to Say Goodbye,” page 5.

Commander in Chief.¹⁵⁰ An additional criticism of the section was the 60-day termination would tip off enemies allowing them to alter their strategies to wait out the U.S. deployment. It could also make U.S. allies hesitate to support operations if they know the U.S. commitment will end within 60 to 90 days.¹⁵¹

Another major issue of contention in Section 5 is it requires the president to automatically terminate hostilities without congressional action. President Nixon raised this issue in his veto of the WPR stating, “the Congress is here attempting to increase its policy-making role through a provision which requires it to take absolutely no action at all.”¹⁵² During the WPR hearings, members of Congress worried the executive and judicial branches would interpret any language in Section 5 requiring Congress to take positive action to be subject to a presidential veto. Others worried the political and public relations pressures of having U.S. forces deployed would prevent the Congress from taking a position against the president.¹⁵³ As a result, Congress decided to make the termination automatic regardless of congressional action to avoid a political showdown.

Congress did, however, include language in Section 5(c) allowing it to terminate U.S. military operations at any time by concurrent resolution, which neither require presidential signature nor carry the force of law. Congress’ basis for a concurrent resolution was it was lawful because there was “no congressional authorization for the President’s action.”¹⁵⁴ Furthermore, Congress had used concurrent resolutions to terminate powers of the president prior to the WPR without constitutional showdowns

¹⁵⁰ Spong, Jr., William B., “The [WPR] Revisited: Historic Accomplishment or Surrender?” pages 841, 845 and Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 6.

¹⁵¹ Nathan, James A., “Salvaging the War Powers Resolution,” *Presidential Studies Quarterly*, Volume 23, No. 2 (1993), pages 250-251.

¹⁵² H. R. Doc. 93-171, page 2.

¹⁵³ Spong, Jr., William B., “The [WPR] Revisited: Historic Accomplishment or Surrender?” page 848.

¹⁵⁴ H. Rpt. 93-287, 93rd Congress, 1st Session, pages 11, 13-14.

such as the termination of emergency powers of the president after World War II as well as with foreign assistance acts during the 1940s and 1960s.¹⁵⁵ Nevertheless, critics vocally opposed this measure as President Nixon stated a concurrent resolution “does not normally have the force of law,” while Republican Senator Strom Thurmond stated, “there is no precedent in the history of this government for such a procedure.”¹⁵⁶

The Supreme Court’s 1983 ruling in *I.N.S. v. Chadha* would raise additional questions about the constitutionality of the use of a concurrent resolution by Congress to override the president. The case ruled it was unconstitutional for Congress to veto actions by the executive branch. There are questions whether this case would apply to the WPR, and I will discuss this in more detail later in this chapter. Congress decided in 1983 to revise the WPR to require the use of a joint resolution to require the withdrawal of U.S. forces.¹⁵⁷ The measure did not actually amend the WPR, but was a freestanding measure for use in the case of the withdrawal of U.S. forces.¹⁵⁸ Congressional scholar Louis Fisher stated the freestanding measure did not amend the WPR, therefore leaving the concurrent resolution as part of the law. However, post 1983, it is questionable whether Congress would attempt to terminate military hostilities with a concurrent resolution.¹⁵⁹

¹⁵⁵ H. Rpt. 93-287, 93rd Congress, 1st Session, pages 13-14 and Spong, Jr., William B., “The [WPR] Revisited: Historic Accomplishment or Surrender?” page 846.

¹⁵⁶ H. R. Doc. 93-171, page 1 and 119 Cong. Rec. S. 20,108 (daily ed. Nov. 7, 1973) as cited in Spong, Jr., William B., “The [WPR] Revisited: Historic Accomplishment or Surrender?” page 846.

¹⁵⁷ Public Law 98-164, page 47, as cited in Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 8.

¹⁵⁸ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 8.

¹⁵⁹ Fisher, Louis, *Presidential War Power, Third Edition, Revised*, Lawrence: University Press of Kansas, 2013, page 151.

4. Analysis of Section 8

Section 8 of the WPR includes language that the president cannot infer congressional authorization for the introduction of U.S. forces into hostilities from other provisions of law, appropriations acts, or treaties unless the treaty specifically authorized the introduction of U.S. forces into hostilities or referenced the WPR.¹⁶⁰ In other words, presidents must get specific authorization from the Congress to deploy U.S. forces into hostilities and cannot cite other statutory guidance to sidestep the WPR. Since the end of World War II, presidents had used these tactics to justify their decisions to expand and continue major military actions such as during the Korean and Vietnam Wars.

Ironically, while President Truman, as well as future presidents, would reference authorization from international treaties such as the U.N. and NATO to initiate hostilities, no international treaties authorize the president to act without congressional authorization. In Section 6 of the U.N. Participation Act, Congress authorizes the president to “to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of the Congress by appropriate Act or joint resolution [emphasis added] ... in accordance with Article 43 of [the U.N. Charter].”¹⁶¹ Article 43 of the U.N. Charter states any military arrangements “shall be subject to ratification by the signatory states in accordance with their respective constitutional processes [emphasis added].”¹⁶² The North Atlantic Treaty uses similar language stating in Article 11 “this Treaty shall be ratified and its provisions carried out by the Parties in

¹⁶⁰ Public Law 93-148, page 4 (see Appendix 1).

¹⁶¹ United Nations Participation Act, December 20, 1945, accessed August 17, 2013, http://avalon.law.yale.edu/20th_century/decad031.asp.

¹⁶² United Nations Charter, Chapter VII, Action with Respect to Threats to the Peace, Breaches to the Peace, and Acts of Aggression, accessed August 17, 2013, <http://www.un.org/en/documents/charter/chapter7.shtml>.

accordance with their respective constitutional processes [emphasis added].”¹⁶³

Therefore, since both treaties refer back to the “constitutional processes” of its members, no president can use authorization from the U.N. or NATO to bypass congressional authorization to initiate hostilities. The Supreme Court’s 1890 ruling in *Geofroy v. Riggs* affirms that treaties cannot usurp constitutional powers (such as to declare war). I will discuss this case in more detail later in the chapter. In conclusion, Section 8 of the WPR reiterates what presidents should already know about the limits of treaty powers.

Nevertheless, some criticize section 8(a) of the WPR as an “impermissible attempt to bind future Congresses” from authorizing military action as they choose, again demonstrating the complexity of codifying war powers law.¹⁶⁴

The WPR is highly controversial, both for the powers it confers to both the president and Congress, as well as for its loose wording. As I have discussed, the WPR’s key provisions raise complex constitutional questions. In the upcoming section, I will discuss how past judicial rulings have helped frame the constitutional questions of the WPR. I will conclude this part with a final analysis of the constitutionality of the WPR.

C. Judicial Matters Relevant to the WPR

1. The “Political Question”

Political questions arise when the Constitution allocates all of the power to perform a function to a single branch, such as its assignment to Congress of the power to declare war. In these cases, the judiciary has preferred to allow the voters to shape policy

¹⁶³ The North Atlantic Treaty, April 4, 1949, accessed August 17, 2013, http://www.nato.int/cps/en/natolive/official_texts_17120.htm.

¹⁶⁴ National War Powers Commission Report, Appendix 1, Miller Center of Public Affairs, accessed February 15, 2015, <http://millercenter.org/policy/commissions/warpowers>, page 18.

through their elected representatives versus the courts.¹⁶⁵ Historically, the courts have helped to settle issues over presidential power in emergencies.¹⁶⁶ I will discuss some of these cases below in this section. However, following the end of World War I, the courts became more hesitant to intervene in political questions over foreign affairs; *Youngstown Sheet & Tube Co. v. Sawyer* being an exception (discussed later).¹⁶⁷

In the 1960s and 1970s, the courts began to state there were circumstances in political questions where courts could intervene. In the 1962 Supreme Court case *Baker v. Carr*, the court ruled the judiciary could determine whether the Tennessee Legislature had properly fulfilled its state power to apportion its congressional districts by stating, “the doctrine of which we treat is one of ‘political questions,’ not one of ‘political cases.’”¹⁶⁸ In 1973, an appellate court ruled within the war powers realm it was within a court’s jurisdiction to determine whether Congress had given authorization for a president to go to war.¹⁶⁹ The court ruled while the judiciary will not hear lawsuits that raise political questions (e.g., was Congress right to declare a war?), it is possible for the courts to hear cases in which they rule whether the branches of government are in compliance with federal and state constitutional laws (e.g., did the president obtain authorization from Congress to go to war?).

While the courts have opened the door to hear political cases, there are certain conditions that each case must have in order for the courts to hear it. The courts will not hear war powers cases in which Congress believes a president did not obtain its

¹⁶⁵ Ford, Christopher A., “War Powers as we live them,” page 5.

¹⁶⁶ Fisher, Louis. “Judicial Review of the War Power.” *Presidential Studies Quarterly*, 35 No. 3 (2005), page 467.

¹⁶⁷ Fisher, Louis. “Judicial Review of the War Power,” page 468.

¹⁶⁸ *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), page 25.

¹⁶⁹ *Mitchell v. Laird*, 488 F.2d 611; 159 U.S. App. D.C. 344; 1973, page 3.

authorization unless it is supported by a congressional majority.¹⁷⁰ Therefore, only if a majority in both chambers of Congress believe a president had assumed Congress' constitutional right to declare war would the court consider the case a political case instead of a political question.

No court case brought by Congress has met this criteria, resulting in all of their dismissals. Congress has previously taken the president to court over war powers matters seven times (four with President Reagan, once with President George H. W. Bush, once with President Clinton, and once with President Obama). The courts reiterated in the 1990 lawsuit against President George H. W. Bush of the need for a congressional majority to bring a suit forward. In this case, 54 members of Congress sued President Bush to obtain congressional authorization before commencing offensive operations against Iraq.¹⁷¹ Although the appellate court agreed the matter was justiciable, it dismissed the case on the doctrine of ripeness stating "it would be both premature and presumptuous for the Court to render a decision on the issue of whether a declaration of war is required at this time or in the near future when the Congress itself has provided no indication whether it deems such a declaration either necessary ... or imprudent."¹⁷² Therefore, the courts agree to rule on political war powers cases, but Congress must come to the court as a unified body before the courts will hear the case.

¹⁷⁰ Auerswald, David P. and Peter F. Cowhey. "Ballotbox Diplomacy: The [WPR] and the Use of Force," page 513.

¹⁷¹ Nathan, James A., "Salvaging the War Powers Resolution," page 248, and *Dellums v. Bush* 752 F. Supp. 1141; 1990 U.S. Dist., page 8.

¹⁷² *Dellums v. Bush* 752 F. Supp. 1141; 1990 U.S. Dist., pages 8-9.

2. Declaring versus Authorizing War

Many Americans do not understand the difference between when Congress declares or authorizes a war. However, there are significant legal differences between the two. In order to fully understand the ongoing war powers debate and law behind the WPR, it is important to explain the differences. The Constitution only makes reference to declaring war. The U.S. has declared war only five times: The War of 1812; The Mexican War; The Spanish-American War; World War I; and World War II. This does not mean that every other war in which the U.S. fought was unconstitutional. In many other cases, Congress has instead authorized the president to use force.

Legally under a declaration of war, a country formally declares a state of war exists between it and another state, thereby cutting all diplomatic and commercial ties between the two.¹⁷³ The declaration also creates a state in which the country can kill combatants, take prisoners, and seize property subject to the laws of war and international norms.¹⁷⁴ In the U.S., a declaration of war gives the president full discretion in which to conduct the war, as well placing the resources of the nation at his disposal and giving special him domestic powers in the name of national security.¹⁷⁵

An authorization is much more limited. In this case, Congress specifically delegates powers to the president thus placing limits on the resources and means he may

¹⁷³ Elsea, Jennifer K., and Matthew C. Weed, "Declarations of War and Authorizations for the Use Military Force: Historical Background and Legal Implications," *Congressional Research Service*, RL31133 (2014), page 20.

¹⁷⁴ Elsea, Jennifer K., and Matthew C. Weed, "Declarations of War and Authorizations for the Use Military Force," pages 19-20 and Fazal, Tanisha M., "Why States No Longer Declare War," *Security Studies*, Vol. 21, Issue 4 (2012), page 559.

¹⁷⁵ Elsea, Jennifer K., and Matthew C. Weed, "Declarations of War and Authorizations for the Use Military Force," Summary and pages 24-25.

use.¹⁷⁶ Authorizations also do not give the president the special emergency powers he receives under a declaration. While the Constitution is silent with regards to authorizations, the Supreme Court ruled in the 1800 case *Bas v. Tingy* that Congress alone has the power to declare or authorize war – “Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects and in time.”¹⁷⁷ While this ruling should prohibit presidential uses of force that are not of a defensive nature, the post-WWII “expansive interpretation” of the president’s inherent war powers and passing of the WPR shows it has not.¹⁷⁸

Declarations of war have fallen out of use in the post-WWII era, not only in the U.S., but internationally. Many scholars believe the reason is due to the increased codifying of the laws of war. International organizations have passed laws concerning the treatment of civilians and banning of certain weapons and strategies. At the forefront of these laws is the U.N. Charter, which bans nations from “threat or use of force against the territorial integrity or political independence of any state.”¹⁷⁹ As a result, the U.N. technically has made any declaration of war illegal – “It is asking the nation to solemnly declare itself to be an international outlaw.”¹⁸⁰

Because of the huge expansion of international laws of war during the 20th century, actual declarations of war place states in complicated situations legally. Political

¹⁷⁶ Bradley, Curtis A., and Jack L. Goldsmith, “Congressional Authorization and the War on Terrorism,” *Harvard Law Review*, Vol. 118:2047 (2005), pages 2074-2075, 2078.

¹⁷⁷ *Bas v. Tingy*, 4 U.S. 37; 1 L. Ed. 731; 1800.

¹⁷⁸ Elsea, Jennifer K., and Matthew C. Weed, “Declarations of War and Authorizations for the Use Military Force,” page 5.

¹⁷⁹ United Nations Charter, Chapter I, Article 2(4), United Nations, accessed 3/24/2015 at <http://www.un.org/en/documents/charter/index.shtml>.

¹⁸⁰ Epps, Garrett, “Yes, Congress Can Authorize War without Formally 'Declaring' It,” *The Atlantic*, September 3, 2013, accessed on March 30, 2015 at <http://www.theatlantic.com/politics/archive/2013/09/yes-congress-can-authorize-war-without-formally-declaring-it/279261/>.

scientist Tanisha Fazal believes states avoid declarations of war due to the litigious risk they place on their leaders and themselves – “as the costs of engaging in formal war have increased with the demand for compliance with a growing body of international humanitarian law, states’ calculations may well have shifted such that the formalities of war are no longer worthwhile.”¹⁸¹ A formal state of war can result in war crimes convictions and international condemnation to states, their leaders, and their soldiers.¹⁸² As a result, Fazal says, “we often see very large conflicts labeled as ‘police actions,’ ‘counterterrorism,’ or ‘incidents’ precisely because political actors want to avoid the legal ramifications of calling their conflicts ‘war.’”¹⁸³

3. Does I.N.S. v. Chadha invalidate the WPR?

Immigration and Naturalization Service versus Chadha (I.N.S. v. Chadha) was a landmark 1983 Supreme Court case that curtailed congressional authority over the executive branch. The Supreme Court ruled one chamber of Congress could not veto an executive branch action once Congress had delegated the authority to the executive branch.¹⁸⁴ Although the decision involved a one-chamber veto of the executive branch, many interpret the decision to invalidate any legislative veto attempt by Congress not presented to the president for signature.¹⁸⁵ Section 5(c) of the WPR and its use of a concurrent resolution to force the withdrawal of U.S. personnel would therefore be unconstitutional applying this interpretation.

¹⁸¹ Fazal, Tanisha M., “Why States No Longer Declare War,” pages 591-592.

¹⁸² Fazal, Tanisha M., “Why States No Longer Declare War,” page 558.

¹⁸³ Fazal, Tanisha M., “Why States No Longer Declare War,” page 574.

¹⁸⁴ I.N.S. v. Chadha, 462 U.S. 919 (1983).

¹⁸⁵ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 7.

There is disagreement whether *I.N.S. v. Chadha* applies to the WPR. Justice Lewis Powell, in concurring with the judgment, noted the legislative veto in many statutes, including the WPR, and added, “I would be hesitant to conclude that every veto is unconstitutional on the basis of the unusual example presented by this litigation.”¹⁸⁶ In *I.N.S. v. Chadha*, Congress had delegated power to the executive branch through the Immigration and Nationality Act.¹⁸⁷ Congress has never delegated the authority to declare war to the executive branch and does not do so in the WPR.¹⁸⁸ As a result, many believe the *I.N.S. v. Chadha* verdict should not apply to the WPR. However, because Congress has never implemented Section 5(c) of the WPR, the courts have never had the opportunity to rule on its constitutionality.¹⁸⁹ One scholar believes the WPR “presents an appropriate case for fashioning an exception to *Chadha*.”¹⁹⁰ Nevertheless, most experts now concede the courts would likely find Section 5(c) unconstitutional due to the ruling.¹⁹¹ Regardless of how the courts would apply *I.N.S. v. Chadha* to Section 5(c) of the WPR, Section 9 of the WPR contains a separability clause that states the rest of the statute would remain in effect even if Section 5(c) became unconstitutional.¹⁹²

4. Judicial War Powers Rulings that Favor Congress

Youngstown Sheet & Tube Co. v. Sawyer was a 1952 Supreme Court case that dealt with defining the extent of the president’s emergency powers during times of war.

¹⁸⁶ *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

¹⁸⁷ Wald, Martin, “The Future of the War Powers Resolution,” *Stanford Law Review*, Volume 36, No. 6 (1984), page 1429.

¹⁸⁸ Rushkoff, Bennett C., “A Defense of the War Powers Resolution,” *The Yale Law Journal*, Volume 93, No. 7 (1984), page 1350, and Wald, Martin, “The Future of the War Powers Resolution,” page 1432.

¹⁸⁹ Wald, Martin, “The Future of the War Powers Resolution,” page 1409.

¹⁹⁰ Wald, Martin, “The Future of the War Powers Resolution,” page 1435.

¹⁹¹ National War Powers Commission Report, Appendix 1, Miller Center of Public Affairs, page 14.

¹⁹² Public Law 93-148, page 5 (see Appendix 1).

During the Korean War, President Truman issued an executive order to seize the nation's steel mills in order to avert a strike he felt would impede the nation's ability to wage war in Korea.¹⁹³ The Supreme Court determined neither Congress nor the Constitution gave President Truman the power to seize private property. Additionally, the court disagreed that the ability to seize private property fell under the president's military powers as Commander in Chief. The court found President Truman violated "the essence of the principle of the separation of governmental powers" and sided with the steel industry.¹⁹⁴

A second significant case in establishing the limits of presidential war power is *Fleming v. Page*, a Supreme Court case from 1850. The case dealt with the Mexican War and the extent of the president's war powers from a congressional declaration of war. The Supreme Court's decision found the president's congressionally-approved war powers to be "purely military."¹⁹⁵ The court found a president could not infer a declaration of war authorized him to delegate other powers of the legislative branch such as the ability to make unilateral treaties or assess taxes.¹⁹⁶ As the Supreme Court stated, "Congress alone has the power to declare war, and the President is only the agent of Congress in carrying it on."¹⁹⁷

Little et al. v. Barreme et al. was a Supreme Court case that arose out of the Quasi War with France in the late 1790s. During the Quasi War, Congress authorized the U.S. Navy and privateers to seize French vessels "bound or sailing to [emphasis added]" France.¹⁹⁸ President John Adams then disseminated orders to the U.S. Navy and

¹⁹³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹⁹⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹⁹⁵ *Fleming v. Page*, 50 U.S. 603; 13 L. Ed. 276; 1850.

¹⁹⁶ *Fleming v. Page*, 50 U.S. 603; 13 L. Ed. 276; 1850.

¹⁹⁷ *Fleming v. Page*, 50 U.S. 603; 13 L. Ed. 276; 1850.

¹⁹⁸ *Little et al. v. Barreme et al.*, 6 U.S. 170; 2 L. Ed. 243; 1804.

privateers “to prevent all intercourse ... between the ports of the United States, and those of France or her dependencies, where the vessels are ... bound to or from French ports [emphasis added].”¹⁹⁹ A U.S. privateer, following President Adam’s orders, captured a vessel sailing from France and brought it to Boston. The Supreme Court determined the seizure was illegal as the privateer captured the vessel sailing from, rather than to, France, as Congress dictated. Although the case revolved around legal technicalities, the court’s ruling reemphasized presidential orders could not exceed war authorizations passed by Congress.

A fourth significant court case dealing with the scope of presidential war powers was *United States v. Smith* from 1806. In this case, a circuit court ruled Colonel William S. Smith engaged in military actions against Spain, a country with which the U.S. was not at war.²⁰⁰ Colonel Smith claimed he was “begun, prepared, and set on foot with the knowledge and approbation of the president of the United States.”²⁰¹ The court ruled it was irrelevant whether the president was aware of the operations, Congress had not authorized any type of hostilities against Spain, and any actions undertaken by any individual to conduct hostilities would be illegal.²⁰² In making its ruling, the court stated, “it is the exclusive province of congress to change a state of peace into a state of war.”²⁰³

The Supreme Court has also made a ruling that significantly weakens a president’s ability to use treaties as justification for war. *Geofroy v. Riggs* was an 1890 case that dealt with the inheritance rights of French nationals to property of their parents in the District of Columbia. An 1853 treaty between the U.S. and France implied the

¹⁹⁹ *Little et al. v. Barreme et al.*, 6 U.S. 170; 2 L. Ed. 243; 1804.

²⁰⁰ Fisher, Louis. “Basic Principles of the War Power,” page 330.

²⁰¹ *United States v. Smith*, 27 F. Cas. 1192; 1806 U.S. App.

²⁰² Fisher, Louis. “Basic Principles of the War Power,” page 331.

²⁰³ *United States v. Smith*, 27 F. Cas. 1192; 1806 U.S. App.

children were not entitled to the property. However, an 1887 law passed by Congress inferred the children were entitled. The court ruled in favor of the children (and Congress) stating, “It would not be contended that [a treaty] extends so far as to authorize what the Constitution forbids, or a change in the character of the government.”²⁰⁴ Because the Constitution gives the power to declare war to solely Congress, the *Geofroy v. Riggs* ruling should negate any claim a president makes in using a treaty as authorization for taking the nation to war.

A final Supreme Court case that limits a president’s war powers is *Ex Parte Milligan*. This case dealt with the trying of southern sympathizers accused of planning insurgent attacks in northern states. The military arrested and tried the sympathizers in Ohio in 1864, a state not in rebellion and whose civilian courts were open. The court ruled it was unlawful for the military to try the sympathizers in a military court where civilian courts were still open. In making this ruling, the court stated the president can only exceed Congress’ authority “in times of insurrection or invasion, or of civil or foreign war” when Congress is unable to meet.²⁰⁵ One expert believes this ruling limits the president’s unilateral war authority to “a threat to national sovereignty.”²⁰⁶

The aforementioned cases have helped to define the scope of a president’s war powers, both in times of emergencies and when Congress has declared war. It is clear from the cases that Congress is the superior branch in matters of war. A president’s war powers are limited to what the Constitution explicitly states (which is not much): direct intervention in times of emergency (including when Congress is unable to meet) and

²⁰⁴ *Geofroy v. Riggs*, 133 U.S. 258; 10 S. Ct. 295; 33 L. Ed. 642; 1890.

²⁰⁵ *Ex Parte Milligan*, 71 U.S. 2; 18 L. Ed. 281; 1866.

²⁰⁶ Bejesky, Robert. “Precedent Supporting the Constitutionality of Section 5(b) of the War Powers Resolution.” *Willamette Law Review*, 49:1 (2012), page 5.

through authorizations Congress gives to the president. In the case of the WPR, the rulings of *I.N.S. v. Chadha* and *Youngstown Sheet & Tube Co. v. Sawyer* hem Congress' ability to terminate military operations in between them. One scholar believes a president ignoring a congressional resolution to terminate hostilities would create a justiciable court case – “Chadha suggests that bicameral passage and presentment is required; *Youngstown* would allow something less.”²⁰⁷

5. Judicial War Powers Rulings that Favor the President

The court has also ruled in favor of the presidency in cases involving the rights of the executive branch over the legislative branch in times of peace and war. The Prize Cases was a Supreme Court case heard during the Civil War. The Supreme Court determined President Abraham Lincoln's blockade of southern ports prior to congressional authorization was legal. Congress was on recess when President Lincoln imposed the blockade under his own authority as Commander in Chief. Congress subsequently recognized the measures President Lincoln undertook when it returned to session.

The case upheld President Lincoln's actions and expansion of presidential powers during times of war. However, the Supreme Court's ruling is applicable only under narrow circumstances as it cited, “the condition of things was unprecedented,” “the ‘state of things’ ... had arisen in [a congressional] vacation,” and “Congress has recognized the validity of these acts of the President” since reconvening.²⁰⁸ Therefore, it is unlikely that

²⁰⁷ Wald, Martin, “The Future of the War Powers Resolution,” page 1441.

²⁰⁸ The Prize Cases, 67 U.S. 635; 17 L. Ed. 459; 1862.

a future president could use this case as justification for initiating hostilities outside of a future U.S. civil war.

The courts have also ruled in favor of the president when he has acted in certain circumstances without congressional authorization. In *Myers v. United States*, the Supreme Court ruled in 1926 the president has the authority to remove executive branch officers he appointed with “the advice and consent of the Senate” without any further congressional approval as this was an executive power under Article II of the Constitution.²⁰⁹ This ruling supported Alexander Hamilton’s belief that the president has broad authority in executive matters.²¹⁰ However, this ruling does not likely impact the war powers debate. The Constitution is silent with regards to the removal of political appointees while it is explicit that Congress has the power to declare war. Furthermore, the courts have historically ruled a president’s war powers are limited to those Congress authorizes and times of national emergency.

In re Neagle was an 1890 Supreme Court case which ruled in favor of presidential actions in the public good without congressional authorization.²¹¹ The case dealt with the executive branch providing U.S. Marshals protection to Supreme Court Justices, but could be expanded to other situations when the president is taking action to ensure the laws of the Constitution “are faithfully executed” as required by the oath of office in Article II.²¹² This ruling supports a president’s use of emergency war powers to protect the nation, but would not likely expand to a president’s use of the military in offensive

²⁰⁹ *Myers v. United States*, 272 U.S. 52; 47 S. Ct. 21; 71 L. Ed. 160; 1926.

²¹⁰ Rushkoff, Bennett C., “A Defense of the War Powers Resolution,” pages 1338 and 1339.

²¹¹ Rushkoff, Bennett C., “A Defense of the War Powers Resolution,” page 1341, and *In re Neagle*, 135 U.S. 1; 10 S. Ct. 658; 34 L. Ed. 55; 1890.

²¹² *In re Neagle*, 135 U.S. 1; 10 S. Ct. 658; 34 L. Ed. 55; 1890.

operations without congressional authorization based on the aforementioned court rulings.

U.S. v. Midwest Oil Company was a 1915 Supreme Court case in which the court ruled in favor of the executive branch when repeatedly pursuing actions “in the public interest.”²¹³ If Congress repeatedly ignores an executive action, “an implied grant of power to preserve the public interest would arise out of like congressional acquiescence.”²¹⁴ A second, more recent case, dealt with congressional acquiescence to the president in foreign affairs. The 1981 Supreme Court case *Dames & Moore v. Regan* dealt with the president’s ability to cancel claims between U.S. companies and Iran in the wake of the agreement the U.S. and Iran reached to free the U.S. hostages held by Iran. The court found “Congress has implicitly approved the practice of claim settlement by executive agreement.”²¹⁵ As a result, the court ruled “in light of the fact that Congress may be considered to have consented to the President's action in suspending claims, we cannot say that action exceeded the President's powers.”²¹⁶ Although the court noted “the narrowness of our decision,” the executive branch has repeatedly cited this case as an example of executive authorization through congressional acquiescence in foreign affairs.²¹⁷

Orlando v. Laird was a recent court decision at the time Congress passed the WPR in 1973. A portion of the case dealt with whether Congress had authorized the Vietnam War through “appropriating billions of dollars to carry out military operations in

²¹³ U.S. v. Midwest Oil Company, 236 U.S. 459; 35 S. Ct. 309; 59 L. Ed. 673.

²¹⁴ U.S. v. Midwest Oil Company, 236 U.S. 459; 35 S. Ct. 309; 59 L. Ed. 673.

²¹⁵ *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

²¹⁶ *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

²¹⁷ *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

Southeast Asia.”²¹⁸ An appellate court in 1971 ruled its judgment would not raise a political question and Congress had authorized the executive branch to continue military operations in Vietnam through its continued appropriations for the conflict.²¹⁹ In reporting S. 2956 in 1972, the Senate stated its disagreement with the *Orlando v. Laird* ruling – “the ‘approval’ implied by an appropriation for a war-making operation already underway is admixed with the unwillingness to withhold the material support required from our forces in the field once they are engaged, rather than a freely given expression of consent.”²²⁰ Congress included Section 8(a)(1) of the WPR to prevent presidents from citing appropriations as congressional authorization.²²¹ However, Section 8(a)(1) may not stand up against the *Orlando v. Laird* ruling if a future lawsuit citing appropriations as authorization went to court.

The courts have found presidents to have an inherent right to protect the lives of U.S. citizens and their property abroad. In 1860, a U.S. Navy ship bombarded a village in Nicaragua in retaliation for threats against an American diplomat and loss of property to an American firm.²²² A circuit court found the president to be justified in his actions to protect U.S. citizens and property abroad. “The protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president. Acts of lawless violence, or of threatened violence to the citizen or his property ... may, not unfrequently, require the most prompt and decided action.”²²³ As a result, presidents

²¹⁸ *Orlando v. Laird*, 443 F.2d 1039; 1971 U.S. App.

²¹⁹ *Orlando v. Laird*, 443 F.2d 1039; 1971 U.S. App.

²²⁰ S. Rpt. 606, 92nd Congress, 2nd Session, page 5.

²²¹ Public Law 93-148, page 4 (see Appendix 1).

²²² Fisher, Louis. *Constitutional Conflicts between Congress and the President, Fifth Edition, Revised*, (Lawrence: University of Kansas Press, 2007), page 259.

²²³ *Durand v. Hollins*, 8 F. Cas. 111; 1860 U.S. App.

have justification for the use of military force abroad if they can show evidence that the lives and property of U.S. citizens were in danger.

United States v. Curtiss-Wright Export Corporation was a landmark 1936 Supreme Court case that many argue gave the president unlimited authority in foreign affairs. The case dealt with President Franklin Roosevelt's executive orders that concerned arms embargos to South American countries. The Supreme Court's ruling, written by Justice George Sutherland, authorized a sweeping expansion of presidential authority in foreign affairs – "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations -- a power which does not require as a basis for its exercise an act of Congress."²²⁴ The ruling is frequently referenced in court cases that support broad powers for the presidency.²²⁵

However, the case's ruling has detractors as well. Sutherland's use and citation of John Marshall's "sole organ" speech from 1800 was taken out of context. John Marshall was referring to a situation where Congress had delegated authority to President John Adams for an extradition treaty with England. Therefore, in that instance, Adams was the "sole organ" of the government. Marshall did not mean this as a blanket statement for the president in foreign affairs.²²⁶ A federal appeals court stated in 1981 it rejected Sutherland's "characterization" of plenary presidential power in foreign affairs.²²⁷ Therefore, while this case is a popular reference in presidential power matters, it is not on as solid footing as some legal scholars claim. Additionally, it deals with powers

²²⁴ United States v. Curtiss-Wright Export Corp., 299 U.S. 304; 57 S. Ct. 216; 81 L. Ed. 255; 1936.

²²⁵ Fisher, Louis, *Presidential War Power, Second Edition, Revised*, page 73.

²²⁶ Fisher, Louis, *Presidential War Power, Second Edition, Revised*, page 71-72.

²²⁷ Fisher, Louis, *Presidential War Power, Second Edition, Revised*, page 73.

Congress has delegated to the president through legislation, versus the power to declare war, which Congress cannot delegate to the president.

The court's rulings in favor of the president have been limited to granting power to him in emergencies, and in acceding to the executive branch for the nation's greater good when the Constitution has been vague or silent on matters. The courts have never ruled in favor of a president initiating an offensive war without congressional authorization. The reason is because the Constitution is clear in delegating the power to declare war with Congress, not the president. The courts have not deviated from this position.

D. Is the WPR Constitutional?

In my opinion, the WPR is a constitutional piece of legislation. The document has its share of critics from presidents, to members of Congress, to scholars. Many criticisms are true about the WPR, from its contradictory language to loopholes. However, the language in the WPR is consistent with the Constitution and judicial history. Section 8(d) of the WPR states the resolution neither alters the constitutional powers of either branch, nor gives the president more war authority than he had before the WPR became law.²²⁸ The WPR can ensure both branches fulfill their constitutional duties before taking the country to war, but only if both branches are willing to abide by it.

The largest criticism of the WPR is it illegally delegates Congress' constitutional authority to declare war to the president by allowing him to wage war for up to 90 days in accordance with Sections 4 and 5. This assumption is incorrect. Sections 4 and 5

²²⁸ Public Law 93-148 (see Appendix 1).

provide flexibility to both the president and Congress. In accordance with the Constitution and judicial history, presidents can respond militarily to emergencies at home and abroad. The WPR allows presidents to respond to minor crises for a limited period of time (up to 90 days), situations in which one scholar says Congress would prefer to avoid formal involvement.²²⁹ One could consider this by itself as an unconstitutional delegation of power from Congress to the president. However, Section 5(c) allows Congress to terminate the president's military operations at any time through the use of a concurrent resolution. Because Congress can terminate presidentially-initiated hostilities at any time, the president is operating under a de facto authorization by Congress until it says otherwise. Therefore, Congress never delegates its constitutional power to declare war to the president making this criticism moot.

The use of a concurrent resolution under Section 5(c) is the second major criticism of the legislation. As I have discussed, concurrent resolutions do not typically carry the force of law because they do not require presidential signature. Furthermore, many believe *I.N.S. v. Chadha* invalidated the use of concurrent resolutions to override presidential actions. Since the courts have never had the opportunity to judge the constitutionality of Section 5(c), we cannot definitively say whether the section is legal. However, many signs point favorably towards the constitutionality of Section 5(c). First, Congress never delegated the power to declare war to the president, unlike in the circumstances of *I.N.S. v. Chadha*. Because Congress is asserting its constitutional right to declare war, many scholars believe a concurrent resolution would suffice to override

²²⁹ Ford, Christopher A., "War Powers as we live them," page 51.

the president.²³⁰ Additionally, the court's ruling in *Dellums v. Bush* (see Chapter 2, Persian Gulf War case) points to signs the courts would hear a case brought by majorities in both chambers to override a president's decision to unilaterally go to war. However, this would require a unified Congress, something that is difficult to achieve in the current era of political polarization. Nevertheless, Congress has a strong case that any action it took pursuant to Section 5(c) against the president would be at a minimum justiciable, if not legal.

There has also been criticism over Section 5(b) allowing Congress to terminate hostilities through inaction. On one hand, the automatic provision of this section actually forces Congress to act if it believes hostilities should continue beyond 90 days. If a majority in Congress cannot support the military action, then it would not have authorized the hostilities in the first place, necessitating its termination. On the other hand, Congress designed Section 5(b) in this manner to avoid presidents from overriding congressional resolutions or blackmailing Congress into support by placing U.S. forces into danger before Congress has been able to vote. The advantages of this section outweighed the potential constitutional risks of inaction. Furthermore, Sections 6 and 7 include expedited procedures for war powers legislation in both chambers. Therefore, the WPR has built-in procedures to expedite votes to authorize a continuation of hostilities when majorities are present, and terminate operations when there is not a majority. There is nothing unconstitutional about this.

There are also no constitutional issues with Section 8's provision that treaties do not provide authorization for hostilities, a position many presidents have taken. The U.N.

²³⁰ Rushkoff, Bennett C., "A Defense of the War Powers Resolution," page 29, and Wald, Martin, "The Future of the War Powers Resolution," page, 1432.

and NATO treaties are very clear that presidents must obtain congressional approval for actions within these organizations. The Supreme Court ruling in *Geofroy v. Riggs* further negates this position for presidents. Section 8's provision that appropriations do not provide authorization is not as definitive. The court's ruling in *Orlando v. Laird* supports the position that appropriations do signify authorization from Congress. However, this ruling was pre-WPR. It is Congress' hope that this legislation will help avoid situations in which congressional authorization was not clear at the onset of hostilities.

A last criticism is over Section 2(c) and whether it infringes on the president's authority as Commander in Chief. Section 2(c) follows both constitutional and judicial interpretations of war powers between the executive and legislative branches. This leads to my final point. The courts have always sided with Congress when authorizing hostilities. They have sided with the president only in matters involving his emergency powers, which include national defense and protection of U.S. nationals and their property abroad. No ruling has given the president authorization to unilaterally take the nation to war. As the courts are in firm agreement with the Constitution that only Congress can bring the nation to war, it makes the need for a piece of legislation like the WPR even more vital as it helps to prevent presidential usurpations of that power and keep it in the hands of the people, through their elected representatives in Congress.

Part III – Chapter 1 Conclusions

The Founding Fathers split the war powers between the president and Congress so that one individual could not “plunge the nation into a rash of chaos, misery, and

disaster.”²³¹ They intentionally left the war powers of the two branches vague to allow for flexibility “in grave matters.”²³² When Congress passed the WPR into law in 1973, it provided the country with better controls to help rebalance war authority between the executive and legislative branches, which in recent years had shifted to the executive branch. The WPR does not attempt to define the war powers of the two branches. Rather, it provides a constitutional framework for the executive and legislative branches to navigate war powers issues in accordance with the powers the Constitution vests in both branches.

The WPR is not a perfect document. Some of its sections are contradictory, and critics consider many of its sections unconstitutional, either infringing on the inherent powers of the president or Congress. However, when one looks past its defects, the WPR’s framework ensures two key elements. First, Congress is always in control of overall authorizations for offensive war, whether through an outright authorization or the WPR’s de facto 60-day authorization, which Congress can terminate at any time through a vote. Second, the WPR acknowledges the president has constitutional authority as Commander in Chief in operations of a defensive or protective nature. This framework does not deviate from the intentions of the Founding Fathers or U.S. case law. The WPR can ensure both branches fulfill their constitutional duties before taking the country to war, but only if both branches are willing to abide by it.

On November 7, 1973, the WPR was a brand new law. It would not have to wait long for its first tests as deteriorating conditions in and around Vietnam in the wake of the U.S. withdrawal would bring the U.S. military back into the region. As the first tests

²³¹ Gray, David and Louis Fisher, “The [WPR], Time to Say Goodbye,” page 17.

²³² Javits, Jacob K., “War Powers Reconsidered,” *Foreign Affairs*, 64.1 (1985), page 2.

neared, there were still many unanswered questions about the WPR. Would presidents recognize the WPR although no president signed it into law? Would presidents try to send U.S. forces into combat unilaterally? Would presidents report to Congress under Section 4(a)(1), or would Congress need to activate the 60-day clock of Section 5(b) by itself? Would the WPR's loose wording, such as the definition of "hostilities" and reporting "in every possible instance" create further presidential loopholes? In the next chapter, I will look at these issues, as well as how the WPR has fared in the courts, as I analyze the effectiveness of the WPR from its passing into law to the present day.

Chapter 2

The War Powers Resolution – An Analysis of its Effectiveness (1973-Present)

Introduction

War places tremendous costs upon a country, in terms of both human and economic costs. The recent war in Iraq and ongoing war in Afghanistan are perfect examples of the high costs of war. Not only have the costs been high for the U.S., but they have been equally high for the people of Iraq and Afghanistan. Because so much is at stake, sending the nation to war is one of the most difficult and important decisions the government can make on behalf of the American people. Congress passed the WPR as a tool to aid the president and Congress in making these decisions.

In this chapter, I analyze the WPR's application in significant military operations since Congress passed it into law in 1973. My analysis provides an understanding of how presidents and Congress have taken the country to war since 1973, and how they have interacted together in the process. The war powers of the executive and legislative branches are a classic example of how the Founding Fathers drafted the Constitution to provide for checks and balances. In my research, I found the two branches often acted as adversaries, not only in acting as checks over the other branch, but also in attempting to assert their own constitutional authority. In conclusion, I side with the many scholars who believe the WPR has successfully curtailed presidentially-initiated military operations and rebalanced the war powers relationship between presidents and Congress.

Part I – Significant Applications of the WPR post 1973

Presidents have submitted over 150 reports to Congress between 1973 and 2015 in which they cited the WPR.²³³ The following 11 cases are examples of significant instances in which the WPR has played a role in the dialogue between the president and Congress in military operations. Each of these cases were significant milestones in the history of the WPR and have helped shape its applicability in future conflicts.

The presidents and Congresses from these cases oftentimes did not overtly abide by the WPR's requirements. Nevertheless, it was a key factor in the outcomes the branches reached. Presidents regularly denounced the WPR publicly and in signing statements, while still being careful not to ignore Congress' constitutional role in declaring or authorizing war. Congress, on the other hand, was often silent or did not challenge the president in the operations. However, many experts believe this was because it was satisfied with the operations or worked with the presidents to achieve a dialogue and arrive at an acceptable course of action and authorization. While neither branch may have followed the WPR to the letter, it is clear both branches established boundaries through their actions which helped shape the ultimate policy decisions.

A. The Mayaguez Incident – 1975

The Mayaguez Incident would mark the fourth use of the WPR in its history. The previous three times all occurred under President Ford in April 1975 and involved the use of U.S. forces to aid in the evacuation of U.S. personnel and civilian refugees from

²³³ Grimmett, Richard F., "The War Powers Resolution: After Thirty-Eight Years," summary page, and Public Papers of the Presidents search, *The American Presidency Project*, accessed March 31, 2015 at <http://www.presidency.ucsb.edu/ws/index.php>.

Vietnam and Cambodia.²³⁴ None of the previous operations involved actual combat. On May 12, 1975, just twelve days after the fall of Saigon, Cambodian naval patrol boats seized the SS Mayaguez and its crew of 40 Americans.²³⁵ Later that evening, President Gerald Ford decided to use military force to rescue the sailors after negotiations failed.²³⁶ President Ford was the House minority leader when Congress passed the WPR two years earlier.²³⁷ He had voted against the bill, supported President Nixon's veto, and voted against the veto-override.²³⁸ Nevertheless, President Ford attempted to comply with the provisions of the WPR.

In order to satisfy the WPR's consulting requirement in Section 3, President Ford ordered his staff on May 13 to notify a list of senior members of Congress of the imminent hostilities. The president's staff did not seek consultation from the congressmen as required by the WPR, but claimed to have received positive support from all.²³⁹ The military operation was poorly planned and executed. While U.S. forces rescued the crew and ship without harm, they lost 41 killed and 49 wounded plus several helicopters in the operation; more lost than the entire crew of the Mayaguez.²⁴⁰ The mission and hostilities were over by the morning of May 15.²⁴¹

²³⁴ Grimmett, Richard F., "The War Powers Resolution: After Thirty-Eight Years," page 52.

²³⁵ Astor, Gerald, *Presidents at War: From Truman to Bush, the Gathering of Military Power to Our Commanders in Chief*, (Hoboken: John Wiley & Sons, Inc., 2006), page 175, and Friedman, Jason, "Gerald Ford, The Mayaguez Incident, and the Post-Imperial Presidency," *Congress & the Presidency*, 37:22-44, 2010, page 26.

²³⁶ Friedman, Jason, "Gerald Ford, The Mayaguez Incident," page 27.

²³⁷ Spong, Jr., William B., "The [WPR] Revisited: Historic Accomplishment or Surrender?" page 834.

²³⁸ Friedman, Jason, "Gerald Ford, The Mayaguez Incident," page 24.

²³⁹ Friedman, Jason, "Gerald Ford, The Mayaguez Incident", page 27.

²⁴⁰ Astor, Gerald, *Presidents at War*, page 180.

²⁴¹ Friedman, Jason, "Gerald Ford, The Mayaguez Incident," page 28.

President Ford formally reported to Congress on May 15 “taking note of [WPR] Section 4(a)(1),” as well as his executive authority to act as Commander in Chief.²⁴² This is significant for several reasons. First, a presidential report under Section 4(a)(1) triggers the 60-day automatic withdrawal clock in Section 5(b). Second, this report is still the only time in the WPR’s history a president has reported under Section 4(a)(1).²⁴³ Finally, although President Ford reported under Section 4(a)(1), the operation had already ended making the automatic withdrawal provision a moot point. Nevertheless, President Ford complied with the WPR. The Mayaguez Incident was short operation (i.e., less than 60 days), thus making congressional authorization unnecessary in accordance with the WPR. The operation is infamous in the history of the WPR for being the only operation to cite Section 4(a)(1), but again, only after the completion of the operation.

B. Lebanon – 1982-1984

The U.S. military involvement in Lebanon between 1982 and 1984 was a significant test of the WPR. In the summer of 1982, President Reagan announced he would deploy 800 U.S. Marines to assist in the peaceful evacuation of Palestine Liberation Organization from Lebanon.²⁴⁴ Congressman Zablocki informed the Reagan Administration this deployment would subject U.S. forces to imminent hostilities and would require the president to file a report under Section 4(a)(1) of the WPR, thus triggering the 60-day clock.²⁴⁵ The Reagan Administration stated it would only deploy

²⁴² Grimmett, Richard F., “War Powers Resolution: Presidential Compliance,” *Congressional Research Service*, RL33532 (2011), page 12, and Fisher, Louis, *Presidential War Power, Third Edition, Revised*, page 156.

²⁴³ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 10.

²⁴⁴ Ford, Christopher A., “War Powers as we live them,” page 9, and Grimmett, Richard F., “War Powers Resolution: Presidential Compliance,” pages 6 and 20.

²⁴⁵ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 13.

the peacekeeping force for 30 days and during that time, it was unlikely the force would be involved in combat. Therefore, the administration planned to report under Section 4(a)(2) as “equipped for combat,” but unlikely to be involved in hostilities and not subject to the 60-day clock.²⁴⁶

However, President Reagan surprised Congress when in his official report on August 21, 1982, he did not cite the WPR and stated only it was his “desire that the Congress be fully informed.”²⁴⁷ The State Department reported President Reagan decided against reporting under the WPR because of the limited duration of the operation (i.e., under 30 days), the assurances from all parties involved in the Lebanon conflict that the U.S. forces would face no danger, and since the president and Congress could not agree on the section under which to report, the Reagan Administration felt “the eminently sensible thing” was to not cite the WPR.²⁴⁸ The peacekeeping/evacuation operation was a success and the U.S. forces withdrew after 30 days having not been engaged in combat.²⁴⁹ As a result, Congress felt no need to press the matter of proper compliance with the WPR.²⁵⁰

The situation in Lebanon began to deteriorate in September 1982 after the September 17 massacre of 460 Palestinian civilians by Lebanese Christian militiamen. The incident was in retaliation for the assassination of President-Elect Bashir Gemayel on September 14. Israeli forces also reoccupied West Beirut at this same moment.²⁵¹ On September 29, 1982, President Reagan reported to Congress “consistent with the [WPR]”

²⁴⁶ Ford, Christopher A., “War Powers as we live them,” page 9.

²⁴⁷ Ford, Christopher A., “War Powers as we live them,” page 9, and Grimmett, Richard F., “War Powers Resolution: Presidential Compliance,” page 20.

²⁴⁸ Ford, Christopher A., “War Powers as we live them,” page 10.

²⁴⁹ Ford, Christopher A., “War Powers as we live them,” page 10.

²⁵⁰ Ford, Christopher A., “War Powers as we live them,” page 11.

²⁵¹ Ford, Christopher A., “War Powers as we live them,” page 12, and Grimmett, Richard F., “War Powers Resolution: Presidential Compliance,” page 5.

that he ordered 1,200 U.S. Marines to deploy to Lebanon.²⁵² The president did not anticipate the Marines would be engaged in combat, but stated they had the right of self-defense and were equipped for combat.²⁵³ Again, President Reagan did not report under a specific section of the WPR. Furthermore, President Reagan, in a statement no doubt to assert his authority exclusive of the WPR, stated:

*“this deployment of the United States Armed Forces is being undertaken pursuant to the president's constitutional authority with respect to the conduct of foreign relations and as Commander-in-Chief of the United States Armed Forces.”*²⁵⁴

In November 1982, the 1,200 U.S. Marines’ deployment to Lebanon exceeded 60 days. However, because President Reagan did not report under Section 4(a)(1) of the WPR, he did not activate the automatic termination provision of Section 5(b). Also during November, Lebanon asked the U.S., along with Italy and France, to double the size of their peacekeeping forces in the country.²⁵⁵ President Reagan stated he would consider the request. In response to the president’s statement, members from both chambers of Congress requested the administration to seek congressional approval prior to any further expansion of the U.S. military presence in Lebanon.²⁵⁶

On April 18, 1983, a car bomb attack on the U.S. Embassy in Beirut resulted in the deaths of 61 people.²⁵⁷ The embassy attack increased congressional fears over a military escalation in Lebanon. Congress was at that moment in the process of drafting an emergency aid package to Lebanon. The bill required the president to “obtain statutory authorization from the Congress” for any expansion of the U.S. presence in Lebanon and explicitly stated, “Nothing in this section is intended to modify, limit, or

²⁵² Grimmer, Richard F., “War Powers Resolution: Presidential Compliance,” page 5.

²⁵³ Grimmer, Richard F., “War Powers Resolution: Presidential Compliance,” page 5.

²⁵⁴ Ford, Christopher A., “War Powers as we live them,” page 12.

²⁵⁵ Ford, Christopher A., “War Powers as we live them,” page 13.

²⁵⁶ Ford, Christopher A., “War Powers as we live them,” page 13.

²⁵⁷ Ford, Christopher A., “War Powers as we live them,” page 13.

suspend any of the standards and procedures prescribed by the [WPR] of 1973.”²⁵⁸

President Reagan signed the bill into law with this language on June 27, 1983.²⁵⁹

The first Marines to be killed in Lebanon occurred on August 29, 1983.²⁶⁰

President Reagan reported their deaths to Congress the following day and included the phrase, “consistent with Section 4 of the [WPR].”²⁶¹ This was President Reagan’s third report to Congress with regards to the ongoing military presence in Lebanon and the third time he did not specifically cite the WPR 4(a) subsection under which he was reporting as required by the WPR. As a result, the president’s reports had still not activated the 60-day clock for the automatic termination of hostilities. The following month, enemy rockets killed two more Marines on September 5. President Reagan ordered retaliatory naval and air strikes against enemy positions and placed additional 2,000 Marines on standby offshore.²⁶² The Reagan Administration continued to deny the escalating military operations fell under the hostilities or imminent hostilities definitions of Section 4(a)(1).²⁶³

While the Reagan Administration publicly stated the U.S. was not involved in hostilities in Lebanon, it was privately working on a compromise with Congress. President Reagan “reportedly” told members of Congress that a report under Section 4(a)(1) or a showdown with Congress would play into the hands of their enemy and encourage them to fight for the forced withdrawal of the Marines from Lebanon.²⁶⁴ On October 12, 1983, the president signed into law a bill which satisfied the objectives of

²⁵⁸ Public Law 98-43, page 2.

²⁵⁹ Public Law 98-43, page 2.

²⁶⁰ Grimmett, Richard F., “War Powers Resolution: Presidential Compliance,” page 5.

²⁶¹ Grimmett, Richard F., “War Powers Resolution: Presidential Compliance,” page 5.

²⁶² Ford, Christopher A., “War Powers as we live them,” page 15.

²⁶³ Ford, Christopher A., “War Powers as we live them,” page 15.

²⁶⁴ Ford, Christopher A., “War Powers as we live them,” page 17.

both branches.²⁶⁵ Public Law 98-119 stated August 29, 1983 triggered Section 4(a)(1) of the WPR (i.e., the day the first Marines died in Lebanon).²⁶⁶ As a result, Congress authorized the U.S. to continue participating in the multilateral force in Lebanon for eighteen months in accordance with the WPR under Section 5(b)(1).²⁶⁷ The law allowed both the president and Congress (by joint resolution) to terminate operations early “if circumstances warrant.”²⁶⁸

In signing the bill, President Reagan attempted to reassert that while he signed the bill into law acknowledging Section 4(a)(1) and Section 5(b) of the WPR applied to Lebanon, he questioned the constitutionality of the WPR itself:

*I believe it is, therefore, important for me to state, in signing this resolution, that I do not and cannot cede any of the authority vested in me under the Constitution as President and as Commander in Chief of United States Armed Forces. Nor should my signing be viewed as any acknowledgment that the President's constitutional authority can be impermissibly infringed by statute, that congressional authorization would be required if and when the period specified in section 5(b) of the War Powers Resolution might be deemed to have been triggered and the period had expired, or that section 6 of the Multinational Force in Lebanon Resolution may be interpreted to revise the President's constitutional authority to deploy United States Armed Forces.*²⁶⁹

Less than two weeks after the signing of the bill that authorized the U.S. military presence to continue in Lebanon for eighteen months, an incident occurred that again redefined the scope of the operation. On October 23, 1983, a suicide car bomb attack on the U.S. Marine barracks in West Beirut killed 239 Marines.²⁷⁰ The attack diminished public and congressional support for the U.S. military presence in Lebanon. The combination of growing public and political unhappiness with the upcoming presidential

²⁶⁵ The Senate passed its bill by a vote of 54-46 on September 29, 1983. The House approved the Senate bill the same day by a vote of 253-154. Grimm, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 15.

²⁶⁶ Public Law 98-119, page 1.

²⁶⁷ Public Law 98-119, pages 1, 3.

²⁶⁸ Public Law 98-119, page 3.

²⁶⁹ Reagan, Ronald, “Statement on Signing the Multinational Force in Lebanon Resolution,” October 12, 1983, accessed August 17, 2013, <http://www.reagan.utexas.edu/archives/speeches/1983/101283c.htm>.

²⁷⁰ Ford, Christopher A, “War Powers as we live them,” page 22.

election in 1984 put President Reagan in a difficult position.²⁷¹ By February 1984, he had decided to withdraw U.S. forces from Lebanon.²⁷² The U.S. military presence would be gone from Lebanon by the end of March.²⁷³

The application of the WPR in Lebanon showed many of the flaws in the law. President Reagan refused to report under specific subsection of Section 4(a) of the WPR as Congress had expected a president to do when it wrote the law. Therefore, the automatic clock to terminate hostilities never started. On the other hand, Congress allowed U.S. forces to remain in Lebanon for longer than 60 days in late 1982 without giving authorization to or taking action against the president. Even President Reagan's signing statement of the Multinational Force in Lebanon Resolution denounced the validity of the WPR. One could easily conclude the WPR was a failure from these facts.

However, many scholars and politicians believe Lebanon proved the WPR a success. Political scientists David Auerswald and Peter Cowhey praised Congress in its "stage management" of the operation through the WPR – "they established a time frame for the deployment, constrained its scope, gathered information, delineated a reversion point should the president exceed his writ of authority, and initiated procedures by which Congress could rescind its delegated authority."²⁷⁴ Congress' passing of the Multinational Force in Lebanon Resolution is still the only time it has formally enacted the WPR and given the president a fixed period of deployment.²⁷⁵ Although President Reagan repeatedly denied the applicability of the WPR to Lebanon and denounced it in

²⁷¹ Ford, Christopher A, "War Powers as we live them," pages 23-27.

²⁷² Grimmett, Richard F., "The War Powers Resolution: After Thirty-Eight Years," page 15.

²⁷³ Grimmett, Richard F., "The War Powers Resolution: After Thirty-Eight Years," page 15.

²⁷⁴ Auerswald, David P. and Peter F. Cowhey. "Ballotbox Diplomacy: The [WPR] and the Use of Force," page 520.

²⁷⁵ Shane, Peter M., "Learning McNamara's Lessons: How the War Powers Resolution Advances the Rule of Law," *Case Western Reserve Law Review*, Volume 47 Issue 4 (1997), page 13.

his signing statement, his administration was very careful to regularly report to Congress and negotiate an extension of authorization with it.²⁷⁶ Congressman Zablocki called the Multinational Force in Lebanon Resolution, “a delicate balance of congressional control and executive flexibility;” precisely the type of result he and his fellow WPR drafters hoped to achieve through the legislation.²⁷⁷

C. Grenada – 1983

U.S. military operations began in Grenada on October 25, 1983; only two days after the Marine barracks bombing in Lebanon. President Reagan decided to send a military force of 1,900 personnel to restore order and protect the lives of American citizens living in the small island nation.²⁷⁸ The Organization of Eastern Caribbean States requested the United States to intervene in Grenada after an October 12, 1983 coup left the country under the control of an oppressive regime.²⁷⁹ President Reagan reported in advance to members of Congress the night before the invasion in loose accordance with Section 3 of the WPR. Democratic Senator Charles Mathias stated of the meeting, “Congressional leaders were simply called to the Oval Office and told the troops were underway. That is not consultation.”²⁸⁰ The following day as the invasion was underway, President Reagan formally reported the operation to Congress only stating he was reporting, “in accordance with my desire that the Congress be informed on this

²⁷⁶ Ford, Christopher A., “War Powers as we live them,” page 15.

²⁷⁷ Ford, Christopher A., “War Powers as we live them,” page 21.

²⁷⁸ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 15.

²⁷⁹ Ford, Christopher A., “War Powers as we live them,” page 30.

²⁸⁰ Javits, Jacob K., “War Powers Reconsidered,” page 137.

matter, and consistent with the [WPR].”²⁸¹ The president continued his practice of not citing a specific section of the WPR in his report to Congress.

The House of Representatives was fast to respond to the U.S. military actions in Grenada and passed H. J. Res. 402 on November 1, 1983 by a lopsided vote of 403-23.²⁸² The bill declared “the requirements of Section 4(a)(1) of the [WPR] became operative on October 25, 1983, when United States Armed Forces were introduced into Grenada.”²⁸³ The Senate attempted to pass the House’s bill, but was delayed when the debt ceiling bill to which it attached the House’s resolution was defeated.²⁸⁴ By this time, there was no need for the Senate to take up the House’s resolution. U.S. forces secured Grenada on October 28, and would leave the island by December 15; still within the 60-day window.²⁸⁵ Furthermore, the success and speed of the operation made it popular with both the American public and Congress.²⁸⁶

Democratic Representative John Conyers and 10 other members of Congress took President Reagan to court claiming the invasion of Grenada was unconstitutional. On January 20, 1984, a judge dismissed the suit citing “equitable discretion,” meaning the legislators had other remedies available to them such as the congressional override provisions of the WPR.²⁸⁷ The congressmen appealed the ruling, but the appellate court dismissed the appeal as moot because the conflict was over.²⁸⁸

²⁸¹ Ford, Christopher A., “War Powers as we live them,” page 31.

²⁸² Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 15.

²⁸³ H. J. Res. 402, 98th Congress, 1st Session, page 1.

²⁸⁴ Wald, Martin, “The Future of the War Powers Resolution,” page 1428.

²⁸⁵ Ford, Christopher A., “War Powers as we live them,” page 31, and Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 15.

²⁸⁶ Ford, Christopher A., “War Powers as we live them,” page 31.

²⁸⁷ *Conyers v. Reagan*, 765 F.2d 1124; 246 U.S. App. D.C. 371; 1985 U.S. App., and Wald, Martin, “The Future of the War Powers Resolution,” page 1438.

²⁸⁸ *Conyers v. Reagan*, 765 F.2d 1124; 246 U.S. App. D.C. 371; 1985 U.S. App.

The Grenada invasion is an example of the difficulties of applying the WPR to brief military operations. Congress essentially authorized presidents to unilaterally conduct military operations with durations of less than 60 days when it passed the WPR. Although the majority of the American public and Congress supported the operation, it demonstrates the potential risks of unauthorized military actions. In this case, an American president was able to conquer a small island nation before the legislature could respond. The U.S. military can accomplish a great deal in a short amount of time, and therefore an unchecked rogue executive could create great havoc if he wanted. The following case is another short, successful invasion accompanied by regime change, but on a larger scale.

D. Panama – 1989-1990

On December 20, 1989, U.S. forces invaded Panama. The invasion would involve 27,000 U.S. military personnel; the largest military operation since the WPR became law.²⁸⁹ President Bush's objectives were to protect the 35,000 American citizens living in Panama, restore democracy, preserve the Panama Canal treaties, and apprehend General Manuel Noriega.²⁹⁰ The U.S.' relationship with Noriega had been deteriorating during this period. On November 21, 1989, Congress passed, and the president signed into law, P.L. 101-162, which stated the U.S. should pursue "measures directed at

²⁸⁹ Burgin, Eileen, "Congress, the War Powers Resolution, & the Invasion of Panama," page 232, and Grimmett, Richard F., "The War Powers Resolution: After Thirty-Eight Years," page 18.

²⁹⁰ Grimmett, Richard F., "The War Powers Resolution: After Thirty-Eight Years," page 18.

removing Manuel Noriega from any position of power in Panama.”²⁹¹ The congressional session ended the following day and would not reconvene until January 23, 1990.²⁹²

President Bush informed senior members of Congress hours before the invasion in loose compliance with Section 3 of the WPR. Congressman Thomas Foley recalled of the meeting: “The President made it clear... that he was informing me of this action not consulting with me or the other members of the Congressional leadership.”²⁹³ The day after the Panama invasion, President Bush formally informed Congress in accordance with Section 4 of the WPR to be “consistent with” the WPR and his actions were in accordance with “constitutional authority with respect to the conduct of foreign relations as Commander and Chief.”²⁹⁴

As Congress was not in session, there was little it could immediately do about the invasion. However, as with Grenada, the invasion was extremely popular with the American public and the majority in Congress.²⁹⁵ When Congress reconvened in 1990, U.S. forces had arrested Noriega, the operation was nearly complete, and it was evident major military operations would conclude within 60 days. As a result, it is unlikely Congress would have taken any action against the president or raised the invasion as a violation of the WPR. In fact, the House passed a resolution which stated the president “acted decisively and appropriately” in Panama.²⁹⁶ As political scientist Eileen Burgin stated, “In the Panama operation ... three elements-popularity, limited duration, and

²⁹¹ Public Law 101-162.

²⁹² Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 19.

²⁹³ Burgin, Eileen, “Congress, the War Powers Resolution, & the Invasion of Panama,” page 246.

²⁹⁴ Nathan, James A., “Curbing the Distress of War: An Outline for a War Powers Resolution that Works,” *Polity*, Volume 23, No. 4 (1991), page 605.

²⁹⁵ Burgin, Eileen, “Congress, the War Powers Resolution, & the Invasion of Panama,” page 234.

²⁹⁶ H. Con. Res. 262, 101st Congress, 2nd Session.

strategically good timing-coincided and helped to inhibit legislators from actively rallying around the WPR.²⁹⁷

The Panama invasion, like the invasion of Grenada, brought a new element into the WPR debate – congressional support of short, successful operations undertaken by the president. If the will of the people, and therefore the will of Congress, is behind a unilateral operation by a president, then it is not necessary to invoke the WPR as it is likely Congress would have authorized the action anyway. However, there will always be risk that this power to unilaterally wage war could be dangerous in the wrong hands. Christopher Ford, former State Department official and present Chief Counsel for the Senate Committee on Appropriations, has appropriately stated that in brief operations, “the President always wins.”²⁹⁸ This is largely due to constitutional design of the branches where the executive branch was designed to respond quickly to issues versus the legislative branch, which was to be more deliberative.

E. The Persian Gulf War – 1990-1991

Saddam Hussein’s invasion of Kuwait on August 2, 1990 precipitated a showdown with the western world. As the Iraqi forces moved towards the Saudi Arabian border, the U.S. feared Saddam Hussein would attempt to invade that country as well, placing a large proportion of the world’s oil reserves under his control.²⁹⁹ President Bush immediately ordered a blocking force to Saudi Arabia, led by a quick reaction brigade of the 82nd Airborne Division.³⁰⁰ The president did not report to Congress until August 9,

²⁹⁷ Burgin, Eileen, “Congress, the War Powers Resolution, & the Invasion of Panama,” pages 235, 239.

²⁹⁸ Ford, Christopher A., “War Powers as we live them,” page 49.

²⁹⁹ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 21.

³⁰⁰ Ford, Christopher A., “War Powers as we live them,” page 33.

1990, after troops began to deploy to Saudi Arabia, and longer than the 48 hour report deadline required by the WPR.³⁰¹

President Bush's report to Congress stated his "desire that Congress be fully informed ... consistent with the [WPR]."³⁰² The House and Senate passed resolutions H. R. 5431 and S. Res. 318, respectively, which both approved of the president's actions and encouraged the use of unilateral and multilateral actions, including embargos, to force Iraq to abandon Kuwait. Neither resolution authorized the president to use force.³⁰³ The president took no issue with the lack of authorization to use force as his position to Congress at the time was hostilities were not "imminent" and the deployment "will facilitate a peaceful resolution of the crisis."³⁰⁴

President Bush ordered a significant buildup of U.S. forces in Saudi Arabia while Congress was on summer recess bringing the total number of troops in Saudi Arabia to 230,000.³⁰⁵ Secretary of Defense Dick Cheney noted the significance of Congress being adjourned during the buildup when he stated, "As a former member, I have to say it was an advantage that Congress was out of town."³⁰⁶ In late August, the United Nations (U.N.) Security Council authorized an embargo of Iraq.³⁰⁷

In early November 1990, Iraq still occupied Kuwait and the U.S. and its allies continued to amass forces to oppose it. On November 8, 1990, President Bush ordered an additional 150,000 troops to Saudi Arabia. This was significant because Congress had just adjourned and President Bush had not disclosed the additional buildup to a

³⁰¹ Grimmett, Richard F., "The War Powers Resolution: After Thirty-Eight Years," page 21, and Nathan, James A., "Salvaging the War Powers Resolution," page 236

³⁰² Nathan, James A., "Curbing the Distress of War," page 605.

³⁰³ Grimmett, Richard F., "The War Powers Resolution: After Thirty-Eight Years," page 21.

³⁰⁴ Nathan, James A., "Salvaging the War Powers Resolution," page 236.

³⁰⁵ Nathan, James A., "Curbing the Distress of War," page 605.

³⁰⁶ Nathan, James A., "Salvaging the War Powers Resolution," page 236.

³⁰⁷ Grimmett, Richard F., "The War Powers Resolution: After Thirty-Eight Years," page 21.

congressional consultation group on October 30, 1990.³⁰⁸ It is worth noting at this time President Bush's repeated use of congressional recesses to deploy and commit U.S. forces to military operations, both in Panama, and now twice in the Persian Gulf.

If Congress was caught off guard by the significant increase of U.S. forces to the Persian Gulf, it was even more surprised when it learned of President Bush's decision for U.S. forces to take "an offensive posture" in theater.³⁰⁹ The Bush Administration only notified one member of Congress of this decision, Senator Sam Nunn, Chairman of the Senate Armed Services Committee, while at a restaurant for dinner.³¹⁰ The notification announced to Senator Nunn that President Bush's announcement to change the posture of U.S. and coalition partners in Saudi Arabia would take place within the hour.³¹¹

On November 16, 1990, President Bush formally reported the buildup and change in posture to Congress stating only he was "updating the Congress with the news."³¹² Furthermore, President Bush reiterated hostilities were still not imminent – "My views on these matters have not changed."³¹³ While Congress supported the defense of Saudi Arabia, it wasn't yet prepared to authorize offensive operations, particularly when the president repeatedly sidestepped his obligations under the WPR to coordinate with Congress.

On November 29, 1990, the U.N. Security Council authorized Resolution 678 which ordered Iraq to leave Kuwait by January 15, 1991. If Iraq did not comply with the deadline, the resolution authorized "all member states" to "use all necessary means" to

³⁰⁸ Grimmett, Richard F., "The War Powers Resolution: After Thirty-Eight Years," page 22.

³⁰⁹ Nathan, James A., "Curbing the Distress of War," page 607.

³¹⁰ Nathan, James A., "Salvaging the War Powers Resolution," page 236.

³¹¹ Nathan, James A., "Curbing the Distress of War," page 607.

³¹² Nathan, James A., "Salvaging the War Powers Resolution," page 236.

³¹³ Nathan, James A., "Salvaging the War Powers Resolution," page 237.

remove Iraqi forces from Kuwait.³¹⁴ President Bush would later state the U.N. resolution gave him “inherent power to commit our forces to battle.”³¹⁵ However, as discussed in the previous chapter, no international treaties authorize the president to act without congressional authorization. A showdown between the president and Congress began to loom.

During December 1990, the Bush Administration continued to send mixed signals about operations in the Persian Gulf. On one hand, the Justice Department continued to claim the president’s reports to Congress still indicated the “[peacekeeping] intent of U.S. troops.”³¹⁶ On the other, the administration continued to take a war footing. On December 3, 1990, Secretary of Defense Cheney stated to the Senate Armed Services Committee he did not “believe that the President required any additional authorization from the Congress before committing U.S. forces to the Gulf to achieve our objectives.”³¹⁷ This was not a new position for the administration, as Secretary of State James Baker had already stated to the Senate Foreign Relations Committee on October 17, 1990: “The President has a right as a matter of practice and principle to initiate military action.”³¹⁸ At this moment in December, President Bush was intent on holding Iraq to the January 15, 1991 deadline set by the U.N. Security Council.

While these events were happening in November and December, Democratic Congressman Ron Dellums, along with 53 representatives and one senator, took President Bush to court. In the court case *Dellums v. Bush*, the members of Congress

³¹⁴ United Nations Security Council Resolution 678 (1990), November 29, 1990, accessed on August 17, 2013, [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/678\(1990\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/678(1990)).

³¹⁵ Nathan, James A., “Salvaging the War Powers Resolution,” page 238.

³¹⁶ Nathan, James A., “Salvaging the War Powers Resolution,” page 237.

³¹⁷ Nathan, James A., “Salvaging the War Powers Resolution,” page 237.

³¹⁸ Nathan, James A., “Salvaging the War Powers Resolution,” page 237.

requested an injunction to prevent the president from conducting offensive operations against Iraq without first obtaining authorization from Congress.³¹⁹ The district court judge denied the injunction on December 13, 1990, because judicial action would require a majority in Congress to file the suit and the executive branch had yet to show a definitive course of action.³²⁰ However, in making this ruling, the judge determined a suit in which Congress believed the president infringed on its constitutional power to declare war was justiciable.³²¹ Furthermore, the court ruled the size of forces engaged could help determine whether hostilities would exist as defined in the WPR:

“Here the forces involved are of such magnitude and significance as to present no serious claim that a war would not ensue if they became engaged in combat, and it is therefore clear that congressional approval is required if Congress desires to become involved.”³²²

This case created a precedent in future WPR incidents – courts could rule whether a president had exceeded his constitutional rights in going to war without congressional authorization.

As a result of this decision, the Senate Judiciary Committee believed it had “legal justification” to bring impeachment proceedings against President Bush if he acted without congressional authorization.³²³ The Bush Administration also concluded there was significant legal risk to act without congressional authorization. On January 8, 1991, President Bush requested approval from Congress to use force against Iraq.³²⁴ The date of the request is significant for several reasons. First, the U.N. Security Council deadline was only one week away from the date the president asked for congressional

³¹⁹ Dellums v. Bush, 752 F. Supp. 1141; 1990 U.S. Dist.

³²⁰ Grimmer, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 22.

³²¹ Dellums v. Bush, 752 F. Supp. 1141; 1990 U.S. Dist.

³²² Dellums v. Bush, 752 F. Supp. 1141; 1990 U.S. Dist.

³²³ Auerswald, David P. and Peter F. Cowhey. “Ballotbox Diplomacy: The [WPR] and the Use of Force,” page 523.

³²⁴ Ford, Christopher A., “War Powers as we live them,” page 36.

authorization. Second, Congress had reconvened on January 4, but the president waited four days to request its consideration, giving Congress four less days to deliberate on the matter. Finally, the president had the power under Article II, Section 3 of the Constitution to convene both chambers “on extraordinary occasions.”³²⁵ Therefore, he could have brought both chambers back early from their recess to give them more time to deliberate. President Bush did not, and as political scientist James A. Nathan wrote, Congress was already “pre-committed” to the war.³²⁶

On January 12, 1990, three days before the U.N. Security Council deadline, both chambers of Congress voted in favor for war. H. J. Res. 77, which President Bush would sign into law as Public Law 102-1, authorized the president to use force in order to implement the U.N. Security Council resolutions passed against Iraq.³²⁷ The proportion of those in favor of war to those against was the lowest in the history of Congress.³²⁸ Congress ensured the authorization for force tied directly to the WPR. Section 2(c) of the Authorization for Use of Military Force Against Iraq Resolution specifically referenced WPR Section 8(a)(1), in which a president cannot infer authorization from a treaty, and Section 5(b), in which Congress can end the automatic 60-day termination of hostilities through an authorization for war. The section concludes with “nothing in this resolution supersedes any requirement of the [WPR].”³²⁹ While President Bush signed the authorization into law, he disagreed with the WPR references. President Bush wrote in his signing statement:

As I made clear to congressional leaders at the outset, my request for congressional support did not, and my signing of this resolution does not, constitute any change in the long-standing positions of the executive

³²⁵ Rossiter, Clinton, ed., *The Federalist Papers, The Constitution*, page 552.

³²⁶ Nathan, James A., “Curbing the Distress of War,” page 627.

³²⁷ Public Law 102-01.

³²⁸ Nathan, James A., “Curbing the Distress of War,” page 607.

³²⁹ Public Law 102-01.

*branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the [WPR].*³³⁰

On January 16, 1991, the day after the U.N. Security Council resolution deadline expired, President Bush reported to Congress he had directed U.S. forces to commence combat operations “consistent with the [WPR].”³³¹

The political showdown between the president and Congress prior to the start of the Persian Gulf War was a significant moment in the history of the WPR. The conflict combined the largest assembly of forces deployed since the enactment of the WPR with an aggressive presidential administration and a hawkish interpretation of executive power. The *Dellums v. Bush* determination on the justiciability of war powers cases strengthened the WPR in the post *I.N.S. v. Chadha* era, and likely contributed to President Bush’s request to Congress for authorization.

While President Bush and his administration vehemently spoke out against the WPR, in the end, he complied with its provisions fairly well. The president reported to Congress on multiple occasions when he expanded the size and scope of the operation. While one may question the quality and timeliness of the reports, he did notify Congress. And finally, the president requested and received congressional authorization for the use of force against Iraq. Furthermore, while many around the world called for the overthrow of Saddam Hussein, President Bush limited the war to the liberation of Kuwait, which was the extent of the use of force Congress authorized.³³² As James A. Nathan wrote about the conflict, “had it not been for the [WPR], President Bush might have disregarded Congress altogether in the Gulf War.”³³³

³³⁰ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 23.

³³¹ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 23.

³³² Shane, Peter M., “Learning McNamara's Lessons,” page 13.

³³³ Nathan, James A., “Curbing the Distress of War,” pages, 626-627.

F. Somalia – 1992-1994

The U.S. military operations in Somalia were unique because they originated out of a humanitarian assistance mission and spanned two presidential administrations. Somalia entered into a civil war in 1991 after the collapse of dictator Siad Barre's regime.³³⁴ To make matters worse, a severe drought hit the country at the same time. As a result, approximately 300,000 Somalis would die over the next two years.³³⁵ On November 25, 1992, President Bush offered to deploy U.S. forces as part of a multi-national U.N. peacekeeping force. The U.N. Security Council accepted the offer and on December 3, 1992 passed U.N. Security Council Resolution 794 that requested member states use "all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia."³³⁶ The following day, President Bush met with senior congressional leadership to discuss the operation, which could be considered loose compliance with the consulting requirement of Section 3 of the WPR.

On December 8, 1992, a U.S. force that would grow to 25,000 strong began to land in Somalia.³³⁷ Two days later, President Bush made his formal report to Congress as the WPR requires under Section 4. The president cited his report was "consistent with the [WPR]," and cited the mission was to achieve the objectives of U.N. Security Council Resolution 794.³³⁸ He also reported he did not foresee hostilities, but U.S. forces were equipped to defend themselves.³³⁹ As with previous presidents and conflicts, the report did not cite WPR Section 4(a)(1) and therefore did not trigger the 60-day automatic

³³⁴ Ford, Christopher A., "War Powers as we live them," page 37.

³³⁵ S. J. Res. 45, 103rd Congress, 1st Session.

³³⁶ United Nations Security Council Resolution 794 (1992), December 3, 1992, accessed on August 17, 2013, [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/794\(1992\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/794(1992)).

³³⁷ Grimmett, Richard F., "The War Powers Resolution: After Thirty-Eight Years," page 27.

³³⁸ Grimmett, Richard F., "The War Powers Resolution: After Thirty-Eight Years," page 27.

³³⁹ Grimmett, Richard F., "The War Powers Resolution: After Thirty-Eight Years," page 27.

termination of hostilities clock. President Bush's deployment of U.S. forces to Somalia would be one of his last actions as president as President Bill Clinton would take office in January.

When President Clinton took office in January 1993, Congress still had not authorized the U.S. military presence in Somalia. The Clinton Administration stated it would welcome congressional authorization, but did not believe it was needed to continue the operation.³⁴⁰ The Senate was the first chamber of Congress to take action on the Somalia operation by passing S. J. Res. 45 on February 4, 1993. The resolution authorized the president under Section 5(b) of the WPR to implement the U.N. Security Council resolution.³⁴¹ The resolution had significant constitutional and WPR implications because Congress was attempting to assert itself in "non-4(a)(1) deployments."³⁴² The House did not take up S. J. Res. 45 until April in large part because the operation was already winding down; the U.S. military began withdrawing in February and passed over control to of the operation to the U.N. in late March.³⁴³ On May 25, 1993, the House passed an amended version of S. J. Res. 45 that included an amendment which triggered Section 4(a)(1) of the WPR and authorized the operation for twelve months.³⁴⁴

Both chambers of Congress had now passed bills to authorize the president not to go to war, but to commit U.S. forces to a peacekeeping operation. The passing of this authorization would greatly, perhaps unconstitutionally, expand the Congress' role in military operations short of outright war. It was questionable whether President Clinton

³⁴⁰ Ford, Christopher A., "War Powers as we live them," page 37.

³⁴¹ S. J. Res. 45, 103rd Congress, 1st Session.

³⁴² Ford, Christopher A., "War Powers as we live them," page 38.

³⁴³ Grimmett, Richard F., "The War Powers Resolution: After Thirty-Eight Years," page 27.

³⁴⁴ Ford, Christopher A., "War Powers as we live them," page 39.

would sign the bill into law as it stood and Congress did not have enough votes to pass it without the president's signature. While the Senate version passed unanimously, the House version passed along party lines, short of the two-thirds needed to override a veto.³⁴⁵ In the end, S. J. Res. 45 and its constitutional implications would become moot. The U.S. presence in Somalia during May was down to 4,000 personnel. The operation was becoming minor and Congress did not see the need to go to conference committee to draft a final bill.³⁴⁶ It would hardly matter, because the scope and scale of the mission was about to irrevocably change.

On June 5, 1993, Somalia militants massacred 23 Pakistani soldiers who were part of the U.N. peacekeeping operation.³⁴⁷ The following day, the U.N. Security Council passed Resolution 837 which authorized the U.N. to "take all necessary measures against all those responsible for the armed attacks," and called on member nations to "contribute military support ... to confront and deter armed attacks."³⁴⁸ President Clinton authorized military strikes to retaliate and reported the actions "consistent with the [WPR]" on June 10, 1993. The president also stated the strikes were made to eliminate obstacles to the U.N. operations in Somalia.³⁴⁹ While President Clinton did not report under Section 4(a)(1), U.S. forces were clearly now involved in hostilities in Somalia.

Instead of invoking the WPR, Congress used one of its strongest weapons, the power of the purse, to dictate policy in Somalia. Both the House and Senate voted on amendments in September 1993 to the 1994 defense authorization bill (for the 1994 fiscal

³⁴⁵ Ford, Christopher A., "War Powers as we live them," pages 38-39.

³⁴⁶ Ford, Christopher A., "War Powers as we live them," page 40.

³⁴⁷ Grimmett, Richard F., "The War Powers Resolution: After Thirty-Eight Years," page 27.

³⁴⁸ United Nations Security Council Resolution 837 (1993), June 6, 1993, accessed on August 17, 2013, [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/837\(1993\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/837(1993)).

³⁴⁹ Grimmett, Richard F., "The War Powers Resolution: After Thirty-Eight Years," page 27.

year beginning October 1, 1993). The amendments required the president to consult with Congress about the future of the operation in Somalia by October 15, 1993 and seek congressional authorization by November 15, 1993.³⁵⁰ Congress knew it had leverage over President Clinton because U.S. forces were clearly involved in hostilities and it could invoke the WPR at any time.

The Clinton Administration tried to counter the WPR argument by stating U.S. forces were not involved in sustained hostilities. Additionally, the administration claimed Congress had already authorized military action in Somalia because both had passed versions of S. J. Res. 45 earlier in the year.³⁵¹ This was a weak argument because the two chambers did not pass the same bill and did not meet in conference to reconcile the bills. On October 3, 1993, the situation in Somalia took another turn for the worse when 23 Americans were killed and nearly 100 wounded in a failed raid against a Somali warlord.³⁵²

Four days after the failed raid, President Clinton fulfilled his obligations as part of the 1994 defense authorization bill and consulted with Congress.³⁵³ On this same day, he announced he would withdraw most U.S. forces by March 31, 1994.³⁵⁴ However, at this same time, he was increasing the firepower and number of troops in Somalia in preparation for a showdown with the Somali warlords.³⁵⁵ In order to avoid a further escalation in Somalia, Congress incorporated language into the 1994 defense authorization bill to force the withdrawal of not most, but all U.S. forces by March 31,

³⁵⁰ Grimmett, Richard F., "The War Powers Resolution: After Thirty-Eight Years," page 27.

³⁵¹ Ford, Christopher A., "War Powers as we live them," page 43.

³⁵² Ford, Christopher A., "War Powers as we live them," page 44.

³⁵³ Grimmett, Richard F., "The War Powers Resolution: After Thirty-Eight Years," page 28.

³⁵⁴ Grimmett, Richard F., "The War Powers Resolution: After Thirty-Eight Years," page 28.

³⁵⁵ Auerswald, David P. and Peter F. Cowhey. "Ballotbox Diplomacy: The [WPR] and the Use of Force," page 522.

1994.³⁵⁶ President Clinton signed the bill into law in November, 1993. A combination of public and political pressure had made the Somalia operation as unattractive to the Clinton Administration as it was to Congress. The U.S. was out of Somalia, but would briefly return to in March 1995 to support the evacuation of the final U.N. personnel in the country.³⁵⁷

The differences in opinion over the extent of presidential and congressional war powers arose again during the operation in Somalia. The fact that both Presidents Bush and Clinton maintained communication with Congress throughout the operation showed the executive branch felt the WPR had some relevance. Although it is questionable whether Congress would have been able to expand its influence into the authorization of non-combat military operations, it was able to reassert that the power of the purse was still one of its strongest policy weapons. While the WPR did not play as large a role in Somalia as it had in other conflicts, many credit Congress with forcing the president to abandon an escalating conflict with limited upside for the nation.³⁵⁸ As constitutional law professor Peter M. Shane wrote, “A less vigilant Congress--the Congress of the 1960s, for example--could easily have allowed [Somalia] to become a version of Vietnam.”³⁵⁹

G. Haiti – 1993-1994

On September 30, 1991, Haitian General Raoul Cedras led a successful military coup over Haiti’s first democratically-elected president Jean Bertrand Aristide.³⁶⁰ By

³⁵⁶ Public Law 103-139, §8151(b)(2)(B).

³⁵⁷ Grimmer, Richard F., “War Powers Resolution: Presidential Compliance,” page 10.

³⁵⁸ Auerswald, David P. and Peter F. Cowhey. “Ballotbox Diplomacy: The [WPR] and the Use of Force,” page 522.

³⁵⁹ Shane, Peter M., “Learning McNamara's Lessons,” page 13.

³⁶⁰ Noelle-Mills, Maryse, “Haiti: The Coup and the Refugee Crisis.” *TransAfrica Forum*, Vol. 9 Issue 1 (1992).

July 1993, Cedras and Aristide had reached an agreement for Aristide to return to power on October 30 of that year.³⁶¹ As a result of the agreement to restore Aristide to power, the U.N. Security Council decided to lift all embargos against Haiti in August.³⁶² Because of the elevated violence in Haiti, which the U.N. believed was “politically motivated” to prevent a stable transition, the Security Council decided in September to authorize a U.N. support mission to assist in the transition of power.³⁶³

The U.S. was to provide the majority of the personnel for the U.N. mission. When a second transport for this mission attempted to land on October 11, 1993, a group of hostile protestors met it at the docks, forcing the ship to depart.³⁶⁴ Two days later, in response to the hostile reception of U.N. personnel and assassinations of Aristide officials, the Security Council voted to re-implement the embargos against Haiti and called on member states “to use such measures ... as may be necessary” to enforce the embargos.³⁶⁵ On October 20, 1993, President Clinton reported to Congress “consistent with the [WPR]” the U.S. Navy was enforcing the U.N. embargo against Haiti.³⁶⁶

The embargo would continue through the summer of 1994. In April 1994, President Clinton reported to Congress “consistent with the [WPR]” that the U.S. Navy had boarded 712 vessels bound for Haiti since the beginning of the embargo.³⁶⁷ In June 1994, the U.N. Security Council voted to implement stronger sanctions in order to

³⁶¹ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 37.

³⁶² United Nations Security Council Resolution 861 (1993), August 27, 1993, accessed on March 15, 2014, [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/861\(1993\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/861(1993)).

³⁶³ United Nations Security Council Resolution 867 (1993), September 23, 1993, accessed on March 15, 2014, [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/867\(1993\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/867(1993)).

³⁶⁴ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 37.

³⁶⁵ United Nations Security Council Resolution 875 (1993), October 16, 1993, accessed on March 15, 2014, [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/875\(1993\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/875(1993)).

³⁶⁶ Grimmett, Richard F., “War Powers Resolution: Presidential Compliance,” page 8.

³⁶⁷ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 37.

pressure the leaders in Haiti to “end the political crisis.”³⁶⁸ As a result, President Clinton tightened the U.S.-led embargo on Haiti and stated he would not rule out the use of force to end the crisis in Haiti.³⁶⁹ As the standoff continued and conditions in Haiti continued to worsen due to the effects of the embargo, the U.N. Security Council authorized on July 31 member states to “use all necessary means” to remove the military leadership and reinstate President Aristide.³⁷⁰

During this time, Congress sent mixed signals regarding its positions on Haiti. On November 11, 1993, President Clinton signed the 1994 Defense Appropriations Act, P.L. 103-139, into law. In this law, §8147 dealt with military appropriations for operations in Haiti. The section stated the president could not use appropriations for operations in Haiti unless Congress preauthorized the operation, was part of a temporary deployment to protect U.S. citizens within Haiti, or was necessary to protect U.S. citizens and national security and the president did not have time to seek authorization in advance, but did so as soon as possible afterwards. However, the section also stated the president could also intervene in Haiti if he transmitted a report to Congress detailing specific criteria about the operation.³⁷¹ This last clause could allow the president to circumvent congressional authorization by merely filing a report.

There were other examples of mixed signals. In May, the House voted in favor of an amendment to the 1994 Defense Appropriations Act only to remove the amendment in June. The amendment would have required the president to certify in advance of

³⁶⁸ United Nations Security Council Resolution 917 (1994), May 6, 1994, accessed on March 15, 2014, [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/917\(1994\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/917(1994)).

³⁶⁹ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 37.

³⁷⁰ United Nations Security Council Resolution 940 (1994), July 31, 1994, accessed on March 15, 2014, [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/940\(1994\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/940(1994)).

³⁷¹ §8147, Public Law 103-139.

operations in Haiti that they were necessary because the situation had become a clear and present danger to U.S. citizens and interests.³⁷² The Senate rejected measures twice between June and August which would have made congressional authorization mandatory prior to operations in Haiti.³⁷³ The Senate passed a measure in August as an amendment to the appropriations bill for the Departments of Veterans Affairs and Housing and Urban Development, that the U.N. authorization to use all necessary means did not constitute congressional authorization.³⁷⁴ However, the conference committee defeated the measure.³⁷⁵ As a result, Congress did not issue specific legislation requiring the president to get preapproval for military operations in Haiti. It had even given the president a way to circumvent authorization altogether. If the president decided to intervene in Haiti using the report option of §8147 of P.L. 103-139, how would this impact the WPR?

In August, President Clinton took a strong position for executive action in Haiti stating, "I would welcome the support of the Congress... Like my predecessors of both parties, I have not agreed that I was constitutionally mandated to get it."³⁷⁶ At this time, public opinion was not behind President Clinton intervening in Haiti; approximately 70 percent of the public was against a military intervention in Haiti and 78 percent believed the president should get authorization from Congress before intervening.³⁷⁷ On

³⁷² Grimmatt, Richard F., "The War Powers Resolution: After Thirty-Eight Years," page 37.

³⁷³ Grimmatt, Richard F., "The War Powers Resolution: After Thirty-Eight Years," page 37.

³⁷⁴ H. R. 4624, §518, 103 Congress, 2nd Session, August 4, 1994, Public Print.

³⁷⁵ "VA-HUD and Related Agencies Appropriations Act for Fiscal Year 1995 – Conference Report," *Congressional Record* 140:18 (September 27, 1994), p. S25984.

³⁷⁶ "Presidential News Conference," *The New York Times*, August 4, 1994, A16.

³⁷⁷ See *Preaching to Skeptics: Clinton Gives His Rationale for Invasion But the Message Faces a Tough Audience*, *The New York Times*, Sept. 16, 1994, at A1; *Invasion of Haiti Would Be Limited, Clinton Aides Say*, *The New York Times*, Sept. 13, 1994, at A13, as referenced in Damrosch, Lori F., "The Constitutional Responsibility of Congress for Military Engagements," *The American Journal of International Law*, Vol. 89, No. 1 (Jan 1995), page 59.

September 15, 1994, President Clinton addressed the nation that he had sent two carrier groups to Haiti and was warning the Haitian military rulers to leave Haiti or the U.S. military would remove them and restore President Aristide to power.³⁷⁸ The U.S. expeditionary force included 20,000 troops from the 10th Mountain Division and 82nd Airborne Division.³⁷⁹ The following day, the president sent former President Jimmy Carter, former Chairman of the Joint Chiefs of Staff Colin Powell, and Senator Sam Nunn to negotiate an exit with the military rulers.³⁸⁰

On September 18, 1994, President Clinton announced his negotiation team had reached an agreement with the Haitian military rulers that they would depart the country by October 15. On September 19, U.S. forces entered Haiti. The president reported the operation in accordance with §8147 of P.L. 103-139, not the WPR.³⁸¹ Shortly thereafter, both chambers passed resolutions commending the negotiating team, supporting the restoration of the rule of law in Haiti, and supporting the withdrawal of U.S. forces “as soon as possible.”³⁸²

Congress eventually gave the president a slight reprimand stating “the President should have sought and welcomed Congressional approval before deploying United States Armed Forces to Haiti.” The bill also included reporting requirements for the president to regularly provide to Congress while U.S. forces were deployed in Haiti. The bill ended with Congress further complicating its position on Haiti – “Nothing in this resolution should be construed or interpreted to constitute Congressional approval or

³⁷⁸ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 38.

³⁷⁹ Damrosch, Lori F., “The Constitutional Responsibility of Congress for Military Engagements.” *The American Journal of International Law*, Vol. 89, No. 1 (Jan 1995), page 58.

³⁸⁰ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 38.

³⁸¹ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 38.

³⁸² H. Con. Res. 290, 103rd Congress, 2nd Session, S. Res. 259, 103rd Congress, 2nd Session.

disapproval of the participation of United States Armed Forces in the United Nations Mission in Haiti.”³⁸³ The president signed this bill into law, including the congressional reprimand, on October 25, 1994 as P.L. 103-423.³⁸⁴

The Justice Department’s Office of Legal Counsel (OLC) provided Congress with a brief of its position that President Clinton had legal authority to unilaterally deploy U.S. forces in Haiti. The brief stated three points, that – 1) the president satisfied the authorization requirements of §8147 of P.L. 103-139 when he submitted his report to Congress detailing the need for the operation; 2) the president was in compliance with the WPR because the law assumes presidents have the authority to unilaterally deploy U.S. forces or the 60-day period of Section 5(b) would not be necessary; and 3) “the nature, scope and duration of the deployment were not consistent with the conclusion that the event was a ‘war’” as the Constitution defines it in Article I, Section 8.³⁸⁵

The U.S. intervention into Haiti in 1994 was a complex matter from a legal perspective. While the Clinton Administration was able to find a last minute political solution to the standoff, it is very likely President Clinton would have invaded Haiti without the consent of Congress based on his previous statements on the matter. Therefore, it is worthwhile to analyze the crisis based on both what did happen and what could have happened if the U.S. invaded. Because no widespread combat broke out when U.S. forces landed in Haiti, the OLC is likely right that the president had authorization for military operations in Haiti after complying with the reporting requirement of §8147 of P.L. 103-139. Additionally, the authorization from P.L. 103-139

³⁸³ H. Con. Res. 290, 103rd Congress, 2nd Session, S. Res. 259, 103rd Congress, 2nd Session.

³⁸⁴ Public Law 103-423.

³⁸⁵ Dellinger, Walter. “Deployment of United States Armed Forces into Haiti, *Opinions of the Office of Legal Counsel*,” September 27, 1994, Volume 18, page 173.

would likely trump the WPR because it was a law the current Congress passed that was specific to the conflict.

Furthermore, President Clinton was likely in compliance with the WPR, but not for the reason stated by the OLC. President Clinton had reported regularly to Congress about the military deployment. Although he used the term “consistent with” for WPR compliance, it is likely that an operation of this type would qualify under Section 4(a)(2) (equipped for combat), which would not trigger the Section 5(b) 60-day clock. Finally, because combat did not break out, the OLC’s position on the constitutional definition of war is also moot in how circumstances played out.

If the U.S. invaded Haiti, which almost occurred, circumstances would have been different. I believe the OLC’s opinion with regards to §8147 of P.L. 103-139 would still hold. Columbia law professor Lori Damrosch cited Congress’ intention in the reporting requirement of §8147 was meant for limited peacekeeping missions only, and therefore should not apply to size and scale of the U.S. intervention.³⁸⁶ However, §8147 does not state peacekeeping operations, but speaks of “mission” and “military operations,” which also fits what actually transpired.³⁸⁷ Therefore, Congress would have difficulty disputing the OLC position, and its best counter would be to prove President Clinton’s report did not satisfy the reporting requirements of §8147.

The strength of the OLC’s positions on the WPR and declare war clause are more complex if the U.S. had invaded Haiti. The OLC claimed the WPR assumes presidents have the authority to unilaterally deploy U.S. forces, or it would not include the Section 5(b) automatic-withdrawal clause; one of the major criticisms of the WPR.

³⁸⁶ Damrosch, Lori F., “The Constitutional Responsibility of Congress for Military Engagements,” page 62.

³⁸⁷ Public Law 103-139, §8147.

Furthermore, history has shown Congress typically defers to the president in short, successful wars. The size of the U.S. expeditionary force in Haiti was similar to that in the 1990 invasion of Panama. Therefore, if the U.S. had been able to quickly overwhelm the anti-Aristide forces, it is likely Congress would not pursue the matter as in Panama. However, if the fighting became prolonged, Congress would have had a case that the invasion violated both the WPR and constitutional positions of the OLC. The *Dellums v. Bush* ruling stated the size of the forces involved could help determine whether war would ensue.³⁸⁸ Prolonged combat operations in Haiti with a 20,000-man American expeditionary force would likely meet that requirement. As a result, Lori Damrosch wrote the OLC opinion with regards to the WPR and Constitution was flawed.³⁸⁹

While much of the debate over the operations in Haiti focus on President Clinton, Congress behaved unusually. Both chambers waffled on whether authorization would be a prerequisite to the insertion of U.S. forces into Haiti. They also allowed for the reporting loophole of the 1994 Defense Appropriations Act, which President Clinton exploited. Then, after praising the results of the operation, they reprimanded the president for not requesting authorization first. In the end, I believe the risks never became high enough in Haiti for Congress to fully mobilize itself as a check on the president. Haiti is yet another example of Congress' deference to the president in small-scale operations unless things go seriously wrong.

³⁸⁸ *Dellums v. Bush*, 752 F. Supp. 1141; 1990 U.S. Dist.

³⁸⁹ Damrosch, Lori F., "The Constitutional Responsibility of Congress for Military Engagements," pages 65-66.

H. Operations in Yugoslavia – 1992-1999

The U.S. military was heavily involved in operations across the warring states of former Yugoslavia throughout most of the 1990s. During this time, President Clinton deployed U.S. forces citing his executive authority to do so, while showing little interest in the opinions of Congress on the matter. At the same time, Congress was never able to pass a unified position on the U.S. role in Yugoslavia, sending repeated mixed signals, but all the while appropriating funds for the U.S. military to operate in combat operations. The U.S.' role in this conflict, and the accompanying congressional lawsuit, would result in one of the largest challenges to the authority and relevance of the WPR in its history.

In August 1992, the U.N. Security Council issued Resolution 770 for humanitarian assistance in Sarajevo, which was embroiled in the Yugoslavian civil war.³⁹⁰ On August 5, the Senate passed a hawkish resolution for the president to pursue U.N. action, including using “all necessary means, including the use of military force” for humanitarian purposes in Yugoslavia.³⁹¹ The Senate also resolved for Congress to “promptly consider any use of United States military forces.”³⁹² The House passed a similar resolution on August 13 for the U.N. to pursue humanitarian relief, including through the use of military force.³⁹³ The Democratic-controlled House and Senate did not meet to reconcile their bills, and as a result, did not provide any formal authorization to the president.

³⁹⁰ United Nations Security Council Resolution 770 (1992), August 13, 1992, accessed on March 23, 2014, [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/770\(1992\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/770(1992)).

³⁹¹ S. Res. 330, 102nd Congress, 2nd Session, page 3.

³⁹² S. Res. 330, 102nd Congress, 2nd Session, page 4.

³⁹³ H. Res. 554, 102nd Congress, 2nd Session, page 4.

The U.S. commitment to Yugoslavia continued to grow in early 1993. On February 10, 1993, Secretary of State Warren Christopher announced the U.S. was working to reach a political resolution to the conflict in which U.S. forces would deploy to Yugoslavia to help maintain any peace agreement.³⁹⁴ The U.S. military began an airlift to Sarajevo on February 28 to provide relief supplies to the besieged city.³⁹⁵ As a result of repeated violations of Bosnian airspace by aircraft of the other warring states, the U.N. Security Council authorized its member states to take “all necessary measures” to enforce the no-fly zone over Bosnia.³⁹⁶ On April 13, 1993, President Clinton reported to Congress, “consistent with section 4 of the [WPR]” that U.S. aircraft were involved in NATO air operations to enforce the U.N. no-fly zone.³⁹⁷ Throughout 1993, U.S. forces would participate in “airlifts into Sarajevo, naval monitoring of sanctions, and aerial enforcement of a ‘no-fly zone.’”³⁹⁸

On July 9, 1993, President Clinton reported “consistent with section 4 of the [WPR]” the deployment of a small contingent of troops to Macedonia as part of a U.N. force charged with preventing fighting in Yugoslavia from entering the country.³⁹⁹ During this time, the U.N. member states continued to plan for a peacekeeping force once a peace agreement could be reached with the former Yugoslavia states. The U.S. commitment to this force was projected to be as high as 25,000 troops, significantly increasing the U.S. military presence in the region.⁴⁰⁰

³⁹⁴ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 29.

³⁹⁵ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 29.

³⁹⁶ United Nations Security Council Resolution 816 (1993), March 31, 1993, accessed on March 23, 2014, [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/816\(1993\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/816(1993)).

³⁹⁷ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 56.

³⁹⁸ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 29.

³⁹⁹ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 30.

⁴⁰⁰ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 30.

To ensure it had a role in any decision to deploy significant U.S. forces to Yugoslavia, Congress included in its 1994 Defense Appropriation Act that the president could not use funds from the act to deploy a peacekeeping force to Yugoslavia without congressional authorization.⁴⁰¹ However, instead of making the requirement binding, Congress used the term “it is the sense of Congress,” thus making it a desire of Congress, but non-directive upon the president.⁴⁰² It is unlikely President Clinton would have signed the bill into law with a directive requirement. The section also included a clause that the qualification did not apply to operations beginning prior to October 29, 1993, effectively authorizing the U.S. operations in Yugoslavia to that point.⁴⁰³

As the conflict continued into 1994, the U.S. and its allies began to conduct airstrikes to lift the siege of Sarajevo and help push for a settlement. On February 11, 1994, President Clinton reported to Congress “consistent with the [WPR]” that he had ordered 60 U.S. aircraft to be available for participation in NATO air operations.⁴⁰⁴ President Clinton would go on to make five reports during 1994 in which U.S. forces conducted airstrikes throughout Yugoslavia.⁴⁰⁵ During 1994, the Senate took action passing S. 2042 which authorized the U.S. to conduct airstrikes “around [U.N.] designated safe areas in Bosnia and Herzegovina and to protect [U.N.] forces.”⁴⁰⁶ However, the House never took up the measure, and as a result, it did not constitute congressional authorization of hostilities in Yugoslavia.⁴⁰⁷ As with the 1994 Defense Appropriations Act, Congress included language in the 1995 act which required the

⁴⁰¹ Public Law 103-139, §8146.

⁴⁰² Public Law 103-139, §8146.

⁴⁰³ Public Law 103-139, §8146.

⁴⁰⁴ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 30.

⁴⁰⁵ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 30.

⁴⁰⁶ S. 2042, 103rd congress, 2nd Session, page 4.

⁴⁰⁷ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 30.

president to obtain authorization for the deployment of U.S. forces as part of a peacekeeping force, but again with the “it is the sense of Congress” modifier, likely making it non-directive.⁴⁰⁸

The president reported to Congress on multiple times in early and mid-1995 “consistent with the [WPR]” that U.S. forces were still regularly involved in air strikes in Yugoslavia.⁴⁰⁹ As with the previous two defense appropriation acts, the 1996 act contained the same “it is the sense of Congress” disclaimer for congressional authorization before introducing U.S. forces as part of a peacekeeping operation into Yugoslavia.⁴¹⁰ The act also authorized the appropriations for the ongoing operations through the end of 1995.

In October of 1995, the warring parties declared a cease fire and planned for a final peace settlement.⁴¹¹ As a result, the likelihood was growing that President Clinton would order a major deployment of U.S. forces into the former Yugoslavian states. Clinton Administration officials stated to the Senate during hearings over the matter that they welcomed approval from Congress, but believed President Clinton had the constitutional right to deploy the troops without congressional authorization.⁴¹² As of January 1995, the Republican Party controlled both chambers of Congress, resulting in a divided government with the president.⁴¹³ Nevertheless, the Republican-controlled Congress was unable to achieve consensus on a position towards the peacekeeping force deployment with the House voting strongly in favor of requiring advance congressional

⁴⁰⁸ Public Law 103-335, §8100.

⁴⁰⁹ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 31.

⁴¹⁰ Public Law 104-61, §8124.

⁴¹¹ Roane, Kit R. “Bosnia Cease-Fire Goes into Effect as Pact is Signed.” *The New York Times*, October 12 1995, A1.

⁴¹² Schmitt, Eric. “Senators Query U.S. Role in Bosnia.” *The New York Times*, October 18, 1995, A1.

⁴¹³ Balz, Dan. “1994. A historic republican triumph: GOP captures congress; party controls both houses for first time since '50s,” *The Washington Post*, Nov 09, 1994, A01.

authorization before deployment (243-171) and the Senate overwhelmingly against the House's bill (22-77).⁴¹⁴ As a result, Congress essentially stepped aside to allow President Clinton deploy forces to the former Yugoslavia and have appropriated funds to do it.

On November 30, 1995, the OLC drafted a memorandum stating the position of the executive branch to deploy troops into Yugoslavia without specific congressional authorization.⁴¹⁵ The OLC stated it is within a president's power to deploy U.S. forces into situations where hostilities are not expected based on "historical practice."⁴¹⁶ It specifically cited the Supreme Court's ruling in *Dames & Moore v. Regan* as an example of Congress acquiescing to the president in a matter of foreign affairs.⁴¹⁷ The OLC believed the legality of a presidentially-ordered deployment to Bosnia should be viewed no differently than previous deployments since Congress had historically allowed presidents to deploy U.S. forces around the world without specific authorization. The memorandum also stated the WPR gave the president authorization to deploy U.S. forces in non-combat situations for an unlimited period of time in accordance with Section 4(a)(2).⁴¹⁸ Further, it stated the WPR did not require congressional authorization for this type of deployment.⁴¹⁹

President Clinton reported to Congress "consistent with the [WPR]" on December 6, 1995 that he had begun to deploy U.S. forces as part of the U.N.

⁴¹⁴ House vote: "Prohibition on Funds for Bosnia Deployment," *Congressional Record* 141-23 (November 17, 1995), p. H33845, and Senate vote: "Prohibition of Funds for Bosnia Deployment," *Congressional Record* 141-25 (December 13, 1995), p. S36825.

⁴¹⁵ Dellinger, Walter. "Proposed Deployment of United States Armed Forces into Bosnia," *Opinions of the Office of Legal Counsel*, November 30, 1995, Volume 19, page 327.

⁴¹⁶ Dellinger, Walter. "Proposed Deployment of United States Armed Forces into Bosnia," page 330.

⁴¹⁷ Dellinger, Walter. "Proposed Deployment of United States Armed Forces into Bosnia," page 331.

⁴¹⁸ Dellinger, Walter. "Proposed Deployment of United States Armed Forces into Bosnia," page 334. Note only operations the president reports under Section 4(a)(1) are subject to the 60-day mandatory withdrawal requirements of Section 5(b).

⁴¹⁹ Dellinger, Walter. "Proposed Deployment of United States Armed Forces into Bosnia," page 334.

peacekeeping force in the region.⁴²⁰ The bulk of U.S forces would deploy after the formal peace signing in Paris on December 14, 1995.⁴²¹ Both chambers of Congress again debated authorization for deployment. The House narrowly voted down a resolution, 210-218, to prohibit the use of any funds to support U.S. ground troops as part of the Bosnian peacekeeping force.⁴²² Instead, the House settled on a non-binding resolution that it had “serious concerns and opposition” to the deployment of U.S. forces to Bosnia.⁴²³ The resolution also took the unusual step of putting the onus back on the president to furnish “the resources and support ... to ensure the safety, support, and well-being [of U.S. forces];” a constitutional responsibility, one could argue, of Congress.⁴²⁴

The Senate also debated measures, voting down one bill that would have prohibited funding for ground forces without congressional authorization and a second opposing President Clinton’s decision to send a large peacekeeping force to the region.⁴²⁵ The Senate passed a resolution authorizing the president to deploy U.S. forces to Bosnia for up to one year as part of the international peacekeeping mission, while reemphasizing “reservations” the Senate had about the president’s decision.⁴²⁶ However, the House and Senate did not meet in conference, and as a result, did not legally arrive at a position in favor or against President Clinton’s deployment.⁴²⁷

⁴²⁰ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 31.

⁴²¹ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 33.

⁴²² “United States Troop Deployments in Bosnia,” *Congressional Record* 141-25 (December 13, 1995), p. H36361.

⁴²³ H. Res. 302, 104th Congress, 1st Session, page 3.

⁴²⁴ H. Res. 302, 104th Congress, 1st Session, page 4.

⁴²⁵ “Prohibition of Funds for Bosnia Deployment,” *Congressional Record* 141-25 (December 13, 1995), p. S36825, and “Expressing Opposition of Congress to President Clinton’s Planned Deployment of Ground Forces in Bosnia,” *Congressional Record* 141-25 (December 13, 1995), p. S3907, respectively.

⁴²⁶ S. J. Res 44, 104th Congress, 1st Session, pages 3-4.

⁴²⁷ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 33.

President Clinton reported the full scale deployment to Bosnia “consistent with the [WPR]” on December 21, 1995, further stating the deployment was within his powers as “Commander in Chief and Chief Executive.”⁴²⁸ Just over two-years later, with U.S. forces still deployed to Bosnia, Congressman Tom Campbell introduced a bill directing the president to remove U.S. forces in accordance with Section 5(c) of the WPR by June 30, 1998.⁴²⁹ Although the House voted down the bill, it would not be Representative Campbell’s last attempt to use the WPR to remove U.S. forces from the former Yugoslavian states.⁴³⁰

On March 26, 1999, President Clinton reported to Congress “consistent with the [WPR]” he had ordered two days previous for U.S. aircraft to commence airstrikes against Yugoslavian forces in Kosovo.⁴³¹ The goal of the airstrikes was to end the Yugoslavian government’s campaign of oppression against Kosovo’s ethnic Albanian majority. Yugoslavian atrocities in Kosovo ultimately led to the deaths of over 10,000 ethnic Albanians and left 1.5 million displaced.⁴³² The Republican Party still controlled both chambers of Congress in 1999, and Congress as a body continued to send mixed signals in the latest crisis in Yugoslavia. Three days before President Clinton’s announcement of airstrikes, the Senate passed a non-binding resolution authorizing the president “to conduct military air operations and missile strikes ... against the Federal Republic of Yugoslavia.”⁴³³ The House did not immediately vote on the Senate’s

⁴²⁸ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 34.

⁴²⁹ H. Con. Res. 227, 105th Congress, 2nd Session, page 2.

⁴³⁰ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 34.

⁴³¹ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 34.

⁴³² Woehrel, Steven J., “Kosovo and U.S. Policy,” *Congressional Research Service*, RL31053 (2004), page 3.

⁴³³ S. Con. Res. 21, 106 Congress, 1st Session.

resolution or provide an alternative. As a result, Congress was again silent as the president's air campaign opened.

In April, the House deliberated and voted on four measures that reflected Congress' various options for the conflict. On April 28, the House voted against the Senate's previous bill authorizing air operations and missile strikes against Yugoslavian forces in a dramatic 213-213 tie vote.⁴³⁴ The House also voted against two bills introduced by Representative Campbell, who had introduced a bill in 1998 to set a deadline for a U.S. withdrawal from Bosnia. The first bill would have declared a state of war between the U.S. and Yugoslavia "pursuant to Section 5(b) of the WPR."⁴³⁵ The second bill would force President Clinton to withdraw U.S. forces from Kosovo "pursuant to Section 5(c) of the WPR."⁴³⁶ Representative Campbell stated his reason for introducing the two bills was to allow "Congress to choose whether it wished the country to be at war or not."⁴³⁷ The House approved the fourth bill, which prohibited the president for using funds "for the deployment of ground elements ... unless that deployment is specifically authorized by law."⁴³⁸ As a result, the House made no decision on the president's air war, and only passed a bill prohibiting the use of ground forces in Kosovo.

Senator John McCain was furious with the House's lack of decisiveness stating, "[the House] voted against the war and against withdrawing our forces. Such a

⁴³⁴ 1999 House Roll No. 103, on 106 S. Con. Res. 21, April 28, 1999.

⁴³⁵ H. J. Res. 44, 106th Congress, 1st Session; 1999 House Roll No. 102, on 106 H. J. Res. 44, April 28, 1999.

⁴³⁶ H. Con. Res 82, 106th Congress, 1st Session; 1999 House Roll No. 101, on 106 H. Con. Res. 82, April 28, 1999.

⁴³⁷ Campbell, Tom. "Kosovo, an Unconstitutional War." *Mediterranean Quarterly*, winter (2000): page 1.

⁴³⁸ H. R. 1569, 106th Congress, 1st Session.

contradictory position does little credit to Congress.”⁴³⁹ The Senate, for its part, voted to table a bill that would have authorized the president to “use all necessary force and other means” in Kosovo.⁴⁴⁰ To further murky the position of Congress, it authorized over \$5 billion in emergency “overseas contingency operations,” which specifically cited the U.S. air operations in Kosovo.⁴⁴¹ The Senate voted to table two amendments to the appropriations bill that would have prohibited funds for ground forces and required congressional authorization prior to funding for further operations, respectively.⁴⁴² As a result, Congress appropriated funds for a war it did not formally authorize.

As a result of the House voting down his two bills and an overall lack of consensus from Congress while the air campaign continued over Kosovo, Representative Campbell and thirty other members of Congress filed a lawsuit against President Clinton which stated he “violated the War Powers Clause of the Constitution and the [WPR].”⁴⁴³ Their objective was for the president “to obtain either a declaration of war or specific statutory authorization from Congress in order to continue the war in Yugoslavia.”⁴⁴⁴ The district court dismissed the case due to the congressmen lacking standing.⁴⁴⁵ To have standing, the judge stated the “plaintiffs must allege that their votes have been ‘completely nullified’ ... Such a showing requires them to demonstrate that there is a true ‘constitutional impasse’ or ‘actual confrontation’ between the legislative and executive

⁴³⁹ Comments of Senator John McCain, Congressional Record, 3 May 1999, p. S4514, as discussed in ProQuest Congressional Inaction article as cited in Boylan, Timothy S. and Glenn A. Phelps. “The War Powers Resolution: A Rationale for Congressional Inaction,” page 120.

⁴⁴⁰ S. J. Res. 20, 106th Congress, 1st Session; 1999 Senate Vote No. 98 on 106 S. J. Res. 20, May 4, 1999.

⁴⁴¹ Public Law 106-31, 113 STAT. 76.

⁴⁴² Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 35.

⁴⁴³ Campbell v. Clinton, 52 F. Supp. 2d 34.

⁴⁴⁴ Campbell, Tom, “Kosovo, an Unconstitutional War,” page 2.

⁴⁴⁵ Campbell v. Clinton, 52 F. Supp. 2d 34.

branches.”⁴⁴⁶ Furthermore, the judge chided Congress for not having sent “a clear, consistent message” with regards to its position on the air campaign in Kosovo.⁴⁴⁷

Because Congress as a body had not voted to stop the war, Representative Campbell and the other plaintiffs could not assert the president violated the Constitution – “Absent a clear impasse between the executive and legislative branches, resort to the judicial branch is inappropriate.”⁴⁴⁸

The district court judge’s opinion framed war powers in a strict, separation of powers framework. He did not even consider the applicability of the WPR in his ruling, which could set precedent for further bypassing of the WPR by the executive branch absent a congressional resolution against a war. Representative Campbell stated the “narrow technical ruling would, in effect, destroy the [WPR].”⁴⁴⁹ A federal appellate court would uphold the district court’s ruling, and the Supreme Court refused to hear the appeal, letting the ruling stand.⁴⁵⁰ As a result, Section 5(b) may no longer be enforceable, and Congress now must rely on its powers to terminate hostilities through a concurrent resolution under Section 5(c), which also has enforceability issues. Nevertheless, the ruling shows a willingness for the courts to hear a “constitutional impasse” lawsuit.

The air campaign against Yugoslavian forces in and around Kosovo lasted for 78 days; 18 longer than the 60-day limit in Section 5(b) of the WPR.⁴⁵¹ Technically, President Clinton violated the law in exceeding the 60-day limit. However, no action was taken against President Clinton beyond the Campbell lawsuit. There are many reasons

⁴⁴⁶ Campbell v. Clinton, 52 F. Supp. 2d 34.

⁴⁴⁷ Campbell v. Clinton, 52 F. Supp. 2d 34.

⁴⁴⁸ Campbell v. Clinton, 52 F. Supp. 2d 34.

⁴⁴⁹ Campbell, Tom, “Kosovo, an Unconstitutional War,” page 6.

⁴⁵⁰ Campbell v. Clinton, 203 F. 3d 19, and Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 36.

⁴⁵¹ Woehrel, Steven J., “Kosovo and U.S. Policy,” page 3.

for this. First, Congress was divided about the course of action to take with regards to Kosovo. As a result, it was unable as a body to pass a bill or resolution that would have legal ramifications. Second, the dismissal of the *Campbell v. Clinton* case demonstrated the courts felt the president had not violated Congress' constitutional rights. As constitutional law scholar John Yoo stated, "a congressional decision to not exercise its constitutional prerogatives does not translate into an executive branch violation of the Constitution."⁴⁵² Finally, the Clinton Administration had its own legal position for justifying President Clinton's unilateral decision to launch the air campaign in and around Kosovo.

On December 19, 2000, the Justice Department's OLC released a memorandum stating the executive branch's position on the legality of the air campaign in Kosovo. The OLC opinion stated Congress' appropriations for operations in and around Kosovo under P.L. 106-31 gave the president authorization to continue hostilities beyond the 60-day time limit of Section 5(b) of the WPR.⁴⁵³ The memorandum further stated Section 8(a)(1) of the WPR, the section which states appropriations do not imply authorization, was not binding on future Congresses.⁴⁵⁴

To reach this conclusion, the OLC cited case law, including *Orlando v. Laird*, in which the courts ruled Congress' appropriations for the Vietnam War inferred its authorization for the war (see Chapter 1 for a brief discussion of this case), as well as the venerable *Marbury v. Madison*, in which Chief Justice Marshall stated acts "void" in theory that subvert the separation of powers of the Constitution "would be giving to the

⁴⁵² Yoo, John. "The Continuation of Politics by Other Means: The Original Understanding of War Powers." *California Law Review*, Vol. 84, No. 2 (1996): page 299.

⁴⁵³ Moss, Randolph D. "Authorization for Continuing Hostilities in Kosovo," *Opinions of the Office of Legal Counsel*, December 19, 2000, Volume 24, page 327.

⁴⁵⁴ Moss, Randolph D. "Authorization for Continuing Hostilities in Kosovo," page 342.

legislature a practical and real omnipotence.”⁴⁵⁵ As a result, the OLC concluded, “Section 8(a)(1) establishes procedural requirements that, under the statute, Congress must follow to authorize hostilities; nonetheless, a subsequent Congress remains free to choose in a particular instance to enact legislation that clearly authorizes hostilities and, in so doing, it can decide not to follow the WPR’s procedures.”⁴⁵⁶ In the OLC’s opinion, “the only clear message that Congress sent [for Kosovo],” was the appropriations for continued operations.⁴⁵⁷

The actions of both President Clinton and Congress over the use of the U.S. military in Yugoslavia damaged the effectiveness of the WPR. President Clinton clearly violated Section 5(b) by not ending U.S. airstrikes in Kosovo after 60 days, or requesting a 30-day extension as is possible under this section. Ironically, as the air operations in and around Kosovo only lasted 78 days, had the president requested and received the extension, the entire operation would have been legal under the WPR and scholars would view Kosovo as a WPR victory. However, President Clinton maintained a position of strong executive inherent authority.

Congress for its part, was inconsistent throughout the operations in Yugoslavia, and one could argue did not fulfill its constitutional responsibilities in authorizing military intervention beyond continued appropriations. Throughout the 1990s, either the Democrats or Republicans controlled both chambers of Congress at the same time, with the Democrats controlling both chambers through January 1995 and the Republicans

⁴⁵⁵ Moss, Randolph D. “Authorization for Continuing Hostilities in Kosovo,” pages 340, 341 and *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60.

⁴⁵⁶ Moss, Randolph D. “Authorization for Continuing Hostilities in Kosovo,” page 343.

⁴⁵⁷ Moss, Randolph D. “Authorization for Continuing Hostilities in Kosovo,” page 363.

thereafter.⁴⁵⁸ Nevertheless, the two chambers could never reach a consensus on the extent of authorization to give President Clinton in using the military in Yugoslavia.

However, was the WPR a complete failure in Yugoslavia? President Clinton, to his credit, did report regularly to Congress regarding changes in operations in Yugoslavia as the WPR requires. Peter M. Shane argued that without the WPR, President Clinton may have decided to deploy ground troops to Yugoslavia prior to the 1995 peace settlement – “the country experienced a better informed and more substantial intra-government debate over military policy than the executive mustered in the Vietnam era.”⁴⁵⁹

However, other scholars view Yugoslavia, particularly Kosovo, as the final failure of the WPR. In U.S. Army lawyer Geoffrey S. Corn’s opinion, the WPR is a failure and even more significant, unconstitutional. He argues no president has ever acted in opposition of “express congressional opposition,” and as a result, one cannot argue the rise of unilateral executive power.⁴⁶⁰ Furthermore, he states history has shown Congress does not always authorize wars expressly through a yes/no declaration, and presidents have relied on the various methods Congress has used to pursue military operations, such as through appropriations.⁴⁶¹ This evidence has created a “historical gloss” on war powers which has created legal precedent.⁴⁶² As a result, he concludes the WPR is unconstitutional in prohibiting future Congresses from giving authorization in methods of

⁴⁵⁸ “102 through 106 United States Congresses,” *Wikipedia*, accessed May 5, 2014 at http://en.wikipedia.org/wiki/102nd_Congress.

⁴⁵⁹ Shane, Peter M., “Learning McNamara’s Lessons: How the War Powers Resolution Advances the Rule of Law,” pages 13 and 14.

⁴⁶⁰ Corn, Geoffrey S., “Clinton, Kosovo, and the Final Destruction of the War Powers Resolution,” *College of William and Mary Law Review*, 42 1149 (2001), page 12.

⁴⁶¹ Corn, Geoffrey S., “Clinton, Kosovo, and the Final Destruction of the War Powers Resolution,” pages 6-7.

⁴⁶² Corn, Geoffrey S., “Clinton, Kosovo, and the Final Destruction of the War Powers Resolution,” pages 3.

their choosing and future presidents from relying on those various methods.⁴⁶³ This conclusion is similar to the one Chief Justice Marshall reached in *Marbury vs. Madison*.

President Clinton violated the provisions of Section 5(b) of the WPR with no consequences. When a group of congressmen led by Representative Tom Campbell tried to enforce the WPR through the courts, the courts overruled them citing lack of standing. The actions of President Clinton and the courts clearly damaged the credibility WPR. However, that does not mean they were wrong in their positions. Instead, the military operations in Yugoslavia helped to further define the scope of the WPR. The *Campbell v. Clinton* ruling placed the onus back on Congress to enforce both its own constitutional prerogatives and the WPR through giving its opinion through votes versus hiding behind the language of the WPR. The actions of future presidents and Congresses will show what effect the operations in Yugoslavia ultimately have on the WPR.

I. The War on Terror (Afghanistan and Iraq) – 2001-Present

The military operations in Afghanistan and Iraq are different than the aforementioned cases. For both Afghanistan and Iraq, the president went to Congress in advance and obtained authorization to use military force before U.S. forces engaged in combat. Both wars have created different degrees of controversy at home, particularly the war in Iraq. However, from a WPR standpoint, they were both legal.

After the September 11, 2001 terrorist attacks in New York City and Washington, D.C., President George W. Bush met with senior congressional leadership to discuss the U.S. response. The two branches were in agreement for Congress to draft a joint resolution that authorized the president to retaliate militarily against those responsible for

⁴⁶³ Corn, Geoffrey S., “Clinton, Kosovo, and the Final Destruction of the War Powers Resolution,” pages 13.

the terrorist attacks.⁴⁶⁴ On September 14, 2001, only three days after the attack, both chambers of Congress passed what would become Public Law 107-40, the Authorization for Use of Military Force. The authorization gave President Bush authorization to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”⁴⁶⁵ The law also cited authorization “within the meaning of Section 5(b) of the [WPR].”⁴⁶⁶

The authorization was significant because it was the first time Congress had used the WPR to authorize hostilities against anything other than a nation. The authorization was so broad that 14 years after its enactment, President Obama is still using it as authority to continue to launch strikes against Al Qaeda and its affiliates around the world. I will discuss in Chapter 3 whether the president should still be able to use the 2001 authorization so long after it was enacted, as well as after the deaths of Osama Bin Laden and much of the leadership that planned the September 11, 2001 terrorist attacks.

President Bush signed the authorization into law on September 18, 2001 and added a qualification that had become common with presidents over the WPR:

“In signing this resolution, I maintain the longstanding position of the executive branch regarding the President’s constitutional authority to use force, including the Armed Forces of the United States and regarding the constitutionality of the [WPR].”⁴⁶⁷

President Bush adhered to the reporting requirements of the WPR both on September 24, 2001, when he deployed U.S. forces to the Afghanistan theater, and October 9, 2001 to

⁴⁶⁴ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 40.

⁴⁶⁵ Public Law 107-40, 107th Congress, 1st Session.

⁴⁶⁶ Public Law 107-40, 107th Congress, 1st Session.

⁴⁶⁷ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 41.

report the commencement of the war in Afghanistan on October 7. The president stated both reports were “consistent with the [WPR].”⁴⁶⁸

President Bush began to lobby hard in the summer of 2002 for action against Iraq because of the threats his administration felt it posed to the U.S. and its allies. The president met with senior congressional leadership on the matter and also addressed the U.N. during September 2002.⁴⁶⁹ On September 19, 2002, the president sent an ambitious draft authorization to Congress asking for authorization to use force against Iraq and throughout the region “to restore international peace and stability.”⁴⁷⁰ By October, both chambers of Congress had passed what would become Public Law 107-243, the Authorization for Use of Military Force against Iraq Resolution of 2002. The resolution authorized President Bush to “defend the national security of the United States against the continuing threat posed by Iraq” as well as enforce U.N. Security Council resolutions and continue to battle terrorist organizations responsible for the September 11, 2001 attacks.⁴⁷¹ As with Public Law 107-40, the Iraq authorization cites it is “authorization within the meaning of Section 5(b) of the [WPR].”⁴⁷²

The authorization was not the carte blanche President Bush wanted, but gave him the authorization he needed to legally invade Iraq. The president signed the authorization into law using similar language to what he used with Public Law 107-40 stating his signature did not change his position over a president’s ability to use force or the “constitutionality of the [WPR].”⁴⁷³

⁴⁶⁸ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 41.

⁴⁶⁹ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 41.

⁴⁷⁰ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 41.

⁴⁷¹ Public Law 107-243, 107th Congress, 2nd Session.

⁴⁷² Public Law 107-243, 107th Congress, 2nd Session.

⁴⁷³ Grimmett, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 41.

There were no constitutional showdowns over the wars in Afghanistan and Iraq. Congress used its constitutional war authority to authorize President Bush to use force to battle Al Qaeda both within and outside Afghanistan, and to invade Iraq. Congress also ensured the authorizations were in compliance with the WPR by citing its authorizing sections in both bills. While many aspects of both wars have received criticism, the president and Congress took the appropriate steps to make both actions legal under the Constitution before they began.

J. Libya – 2011

In February 2011, the regime of Libyan ruler Muammar Qaddafi began to disintegrate pitting the pro-Qaddafi forces concentrated in the west of the country against the rebel forces concentrated in the east. By mid-March, pro-Qaddafi forces were overpowering the rebel forces and threatening to massacre civilians in eastern Libya. The League of Arab Nations requested the U.N. Security Council to implement a no-fly zone over Libya on March 12, 2011.⁴⁷⁴ On March 17, 2011, the U.N. Security Council passed Resolution 1973 which authorized member states “to take all necessary measures ... to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.”⁴⁷⁵ While the resolution forbids forces on the ground, it explicitly authorized a no-fly zone, arms embargo, and the freezing of Libyan assets.⁴⁷⁶

⁴⁷⁴ Krass, Caroline D., “Authority to Use Military Force in Libya,” *Opinions of the Office of Legal Counsel*, April 1, 2011, Volume 35, pages 1 and 2.

⁴⁷⁵ United Nations Security Council Resolution 1973 (2011), March 17, 2011, accessed on August 17, 2013, [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1973\(2011\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1973(2011)).

⁴⁷⁶ United Nations Security Council Resolution 1973 (2011), March 17, 2011.

As congressional scholar Louis Fisher wrote, “‘all necessary measures’ are diplomatic code words for military force.”⁴⁷⁷

The United States, Great Britain, France, and Canada led a NATO force along with their Arab League allies to intervene in Libya. On March 21, 2011, President Obama submitted a report to Congress “consistent with the [WPR]” that U.S. forces began to conduct military operations in Libya on March 19, 2011.⁴⁷⁸ President Obama stated the military operations “will be limited in their nature, duration, and scope,” and were “authorized under U.N. Security Council Resolution 1973.”⁴⁷⁹ As I discussed in Chapter 1, Section 8 of the WPR states presidents cannot infer authorization from treaties. The U.N. Charter specifically states Congress must approve military actions in support of the U.N.

Also on March 21, 2011, President Obama stated during a news conference “it is U.S. policy that Qaddafi must go.”⁴⁸⁰ U.N. Security Resolution 1973 did not make any mention of regime change in Libya; only to protect the lives of Libyan civilians. Furthermore, Congress had yet to provide any authorization for operations in Libya, and authorization in support of a humanitarian crisis would be very different from authorization to aid in the overthrow of a government by force. Nevertheless, by April 4, 2011, the U.S. had transferred operational control over to its NATO allies and was providing predominately intelligence and logistical support to the mission. However, the

⁴⁷⁷ Fisher, Louis, “*The Law*. Military Operations in Libya: No War? No Hostilities?” *Presidential Studies Quarterly*, 42 No. 1 (2012), page 178.

⁴⁷⁸ Grimmett, Richard F., “War Powers Resolution: Presidential Compliance,” page 11.

⁴⁷⁹ Grimmett, Richard F., “War Powers Resolution: Presidential Compliance,” page 11.

⁴⁸⁰ Fisher, Louis, “*The Law*,” page 178.

president did report U.S. forces were still carrying out some “precision strikes ... in support of the NATO-led coalition’s efforts.”⁴⁸¹

President Obama reported to Congress in May on the 60th day of the operation. While neither the president nor Congress had yet triggered the 60-day automatic termination of hostilities provision of the WPR, the president still felt it prudent maintain an open dialogue with Congress and not ignore the WPR. In his 60-day report, President Obama stated U.S. support was still “crucial to assuring the success of the international efforts.”⁴⁸² While the president felt congressional support in Libya “would demonstrate a unity of purpose among the political branches in this important national security matter,” he also asserted his presidential authority stating the military action was “pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.”⁴⁸³

President Obama’s administration believed it did not need congressional authorization for the military operations in Libya. On April 1, 2011, the Justice Department’s OLC provided a memorandum in which it concluded President Obama “had constitutional authority to direct the use of force against Libya.”⁴⁸⁴ The OLC opinion stated presidents may authorize the use of force to protect national interests. In the case of Libya, those national interests were “preserving regional stability and supporting the [U.N. Security Council’s] credibility and effectiveness.”⁴⁸⁵ The memorandum also stated the operation in Libya did not constitute “the level of a ‘war’

⁴⁸¹ Grimm, Richard F., “War Powers Resolution: Presidential Compliance,” page 12.

⁴⁸² Grimm, Richard F., “War Powers Resolution: Presidential Compliance,” page 12.

⁴⁸³ Fisher, Louis, “*The Law*,” page 179 and Grimm, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 45.

⁴⁸⁴ Krass, Caroline D., “Authority to Use Military Force in Libya,” page 1.

⁴⁸⁵ Krass, Caroline D., “Authority to Use Military Force in Libya,” page 10.

in the constitutional sense” because of the operation’s limited objectives and duration.⁴⁸⁶

As a result, the OLC concluded President Obama did not need a declaration of war or special authorization from Congress.⁴⁸⁷

President Obama reasserted the OLC position in his June 15, 2011 32-page report to Congress. In this report, President Obama focused on the key WPR term “hostilities” and how it did not apply to the military operations in Libya. The administration’s counter-argument term had become “limited.” President Obama wrote to Congress, “the President had constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers, to direct such limited military operations abroad.”⁴⁸⁸ The president then referenced the WPR and stated, “U.S. military operations [in Libya] are distinct from the kind of ‘hostilities’ contemplated by the Resolution’s 60-day termination provision.”⁴⁸⁹ President Obama’s definition of “hostilities” became controversial. The U.S. military was involved in a major air campaign over Libya, was paying its personnel “imminent danger pay,” and included drone strikes.⁴⁹⁰ As Democratic Senator Richard Durbin stated, “hostilities by remote control are still hostilities.”⁴⁹¹

So, how exactly did the Obama Administration define “hostilities” and why was it not applicable to Libya? On June 28, 2011, Harold Koh, the State Department’s legal advisor, testified in front of Congress to discuss the applicability of the WPR to the operations in Libya. Mr. Koh claimed the administration was “acting lawfully, with both

⁴⁸⁶ Krass, Caroline D., “Authority to Use Military Force in Libya,” page 13.

⁴⁸⁷ Krass, Caroline D., “Authority to Use Military Force in Libya,” page 13.

⁴⁸⁸ Grimmett, Richard F., “War Powers Resolution: Presidential Compliance,” page 13.

⁴⁸⁹ Grimmett, Richard F., “War Powers Resolution: Presidential Compliance,” page 13.

⁴⁹⁰ Fisher, Louis, “*The Law*,” page 182.

⁴⁹¹ Fisher, Louis, “*The Law*,” page 182.

the letter and spirit of the Constitution and the [WPR].”⁴⁹² He continued to state neither the courts, nor Congress, had ever defined “hostilities.”⁴⁹³ It was his opinion the congressional founders of the WPR intentionally left the term vague to “avoid making the resolution a one-size-fits-all straight jacket that would operate mechanically without regard to the facts.”⁴⁹⁴ According to Mr. Koh, the administration did not believe the operations in Libya constituted “hostilities” because of four factors: a limited mission; limited exposure to U.S. personnel; limited risk of escalation; and limited use of military tactics.⁴⁹⁵

Congressional scholar Louis Fisher found the interpretation of “hostilities” by the Obama Administration and Mr. Koh troubling. He believed the administration’s opinion that limited military actions did not fall under the WPR was false – “The [WPR] does not speak of ‘risk.’ It speaks of *hostilities*.”⁴⁹⁶ Furthermore, Mr. Fisher turned the tables on the administration’s position by asking, “If another nation sent missiles into New York City or Washington, DC, and did not suffer significant casualties, would we call it war?”⁴⁹⁷

Mr. Fisher believed the Obama Administration violated the WPR in Libya. First, he cited presidents cannot infer authorization to use force from international bodies as both the Constitution and WPR forbid this delegation of power outside of Congress.⁴⁹⁸ Second, Section 4 of the WPR does not provide exemptions for “limited” hostilities

⁴⁹² United States. Committee on Foreign Relations, United States Senate. *Libya and War Powers*. S. HRG. 112-89. Washington: Committee on Foreign Relations, 2011, page 7.

⁴⁹³ United States Senate. *Libya and War Powers*. S. HRG. 112-89. page 8.

⁴⁹⁴ United States Senate. *Libya and War Powers*. S. HRG. 112-89. page 8.

⁴⁹⁵ United States Senate. *Libya and War Powers*. S. HRG. 112-89. pages 14-15.

⁴⁹⁶ Fisher, Louis, “*The Law*,” page 180.

⁴⁹⁷ Fisher, Louis, “*The Law*,” page 180.

⁴⁹⁸ Fisher, Louis, “*The Law*,” pages 180, 182.

versus outright hostilities.⁴⁹⁹ Mr. Fisher concluded by giving an example of the slippery slope to which the Obama Administration's definition of hostilities could lead – “a nation with superior military force could pulverize another country – including the use of nuclear weapons – and there would be neither hostilities nor war.”⁵⁰⁰ Mr. Fisher also cited the ease in which the president was able to escalate the operation – “Obama went beyond the Security Council resolution ... such as attempting regime change and giving direct aid to the rebels.”⁵⁰¹

The 112th Congress was in session during the military operations in Libya. This was a divided Congress, with the Democratic Party controlling the Senate and the Republican Party the House of Representatives. The operations in Libya were a partisan issue in Congress. As such, the Senate was mostly supportive of President Obama's use of the U.S. military in Libya while the House was strongly against it. As with any congressional action, if the two chambers of Congress are divided against each other, it will be very difficult, if not impossible, to pass legislation. The WPR requires Congress to pass joint or concurrent resolutions in order to implement the will of Congress under the WPR. This is particularly true when presidents do not report under Section 4(a)(1) to trigger the automatic provisions of Section 5(b), which as I have discussed, has only happened one time in history (during the 1975 Mayaguez Incident).

On June 3, 2011, the House voted on two bills concerning the military operations in Libya. H. Con. Res. 51 would have triggered Section 5(c) of the WPR and required the president to remove all U.S. forces from Libya within 15 days.⁵⁰² The bill would

⁴⁹⁹ Fisher, Louis, “*The Law*,” page 182.

⁵⁰⁰ Fisher, Louis, “*The Law*,” page 182.

⁵⁰¹ Fisher, Louis, “*The Law*,” page 185.

⁵⁰² H. Con. Res. 51, 112th Congress, 1st Session.

have required a continuing resolution, meaning the Senate would also have to vote in favor. The House voted down this bill 148-265, demonstrating even the Republican-controlled House was not ready to completely pull out of Libya.⁵⁰³

The second bill was more successful. In H. Res. 292 the House stated the president had “failed to provide Congress with a compelling rationale based upon United States national security interests for current United States military activities regarding Libya.” It ordered the president to not deploy ground troops in Libya and provide a report to the House that among other things required explanation for “the President’s justification for not seeking authorization by Congress for the use of military force in Libya,” and “United States political and military objectives regarding Libya.”⁵⁰⁴ The resolution passed the House by a vote of 268 to 145.⁵⁰⁵ However, because H. Res. 292 was only a resolution of the House, it would not have the force of law. Nevertheless, the president’s aforementioned 32-page report from June 15, 2011 was in response to this request.

On June 28, 2011, the Senate Foreign Relations Committee passed S. J. Res. 20, which would authorize the president’s actions in Libya under the WPR. The bill had bipartisan support in the committee and included as cosponsors Republican Senators John McCain and Lindsey Graham.⁵⁰⁶ The bill authorized the operations in Libya under Section 5(b) of the WPR. It would also allow the limited operations to continue for up to one year, but would not allow the president to use any appropriations to introduce ground

⁵⁰³ Grimmett, Richard F., “War Powers Resolution: Presidential Compliance,” page 13.

⁵⁰⁴ H. Res. 292, 112th Congress, 1st Session.

⁵⁰⁵ Grimmett, Richard F., “War Powers Resolution: Presidential Compliance,” page 13.

⁵⁰⁶ Bendery, Jennifer, “Senate Committee Passes Resolution Backing Obama on Libya,” *The Huffington Post*, June 28, 2011, accessed August 17, 2013, http://www.huffingtonpost.com/2011/06/28/senate-republicans-clash-with-obama-on-libya_n_886222.html.

forces in Libya.⁵⁰⁷ However, Senate Majority Leader Harry Reed decided against bringing the resolution to vote in the Senate due to building Republican opposition in the Senate.⁵⁰⁸ Senator Reed also likely realized the issue was moot as the House had voted against two similar resolutions on June 24.⁵⁰⁹ The first House resolution would have authorized the Libya operations and the second would have forbid president to use any Libyan military appropriations to introduce ground forces.⁵¹⁰

On October 27, 2011, the U.N. Security Council voted to terminate the military actions it authorized under Security Council Resolution 1973 effective October 31, 2011.⁵¹¹ Congress never approved or terminated the U.S. military operations in Libya between March and October 2011. As Congress could not reach a consensus on Libya, it fell into the “zone of twilight” which Justice Robert Jackson described in *Youngstown Sheet & Tube Co. v. Sawyer*.⁵¹² The military operations in Libya were similar to those in Panama during 1989 in the sense that Congress typically defers to the president either through its actions, or inaction (due to a lack of consensus in Congress during 2011) in short, ultimately successful operations undertaken by the president.

However, Libya marked the second time in 12 years a president had disregarded the 60-day automatic termination of hostilities provision of Section 5(b) of the WPR (the first being President Clinton in Kosovo in 1999). What did this mean for the future relevance of the WPR? U.S. forces were involved in combat operations in the cases of

⁵⁰⁷ S. J. Res. 20, 112th Congress, 1st Session.

⁵⁰⁸ Friedman, Dan, and Chris Strohm, “Senate Spikes Libya Resolution,” *The Atlantic Wire*, July 5, 2011, accessed August 17, 2013, <http://www.theatlanticwire.com/politics/2011/07/senate-spikes-libya-resolution/39597/>.

⁵⁰⁹ Grimmett, Richard F., “War Powers Resolution: Presidential Compliance,” page 14.

⁵¹⁰ H. J. Res. 68, 112th Congress, 1st Session, and H. R. 2278, 112th Congress, 1st Session.

⁵¹¹ United Nations Security Council Resolution 2016 (2011), October 27, 2011, accessed on August 17, 2013, [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2016\(2011\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2016(2011)).

⁵¹² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

both Libya and Kosovo. However, both conflicts were limited to air campaigns and did not involve large ground forces in combat. In both conflicts, one chamber of Congress passed a resolution barring the deployment of ground forces. While a one-chamber resolution is not binding upon a president, Presidents Clinton and Obama avoided showdowns with Congress by not escalating hostilities through the deployment of ground forces.

Libya and Kosovo demonstrate that not only will Congress defer to presidents in short, successful operations, but it will also defer in operations limited to air campaigns. While the Libyan and Kosovar conflicts were controversial both in Congress and across the nation, their risks in terms of human lives, cost, and international relations were less than that of a conventional land and air war. Therefore, neither conflict rose to the level that the American people and its elected representatives felt was necessary to intervene. It should also be noted that in June 2011, a small group of ten congressmen led by Dennis Kucinich and Ron Paul sued President Obama to end the war. However, as with all other attempts of this kind, the courts found the plaintiffs to lack standing and still had legislative remedies available.⁵¹³

Louis Fisher believes the Obama Administration's strategy to loosen the WPR definition of hostilities is "likely to broaden presidential power for future military actions."⁵¹⁴ However, this may be a moot point as Congress' behavior since 1973 has been defer to the president unless the size of the conflict required congressional authorization (i.e., the 1991 Persian Gulf War or the War on Terror), or the U.S commitment on the ground was dangerous and had limited upside (i.e., Lebanon).

⁵¹³ Kucinich v. Obama, 821 F. Supp. 2d 110, 2011.

⁵¹⁴ Fisher, Louis, "The Law," page 177.

Therefore the actual definition of hostilities may not be as important as the size and scope of the hostilities.

K. Syria – 2013

On August 31, 2013, President Obama announced he would go to Congress for authorization to use military force against Syrian military forces loyal to President Bashar al Assad.⁵¹⁵ The Syrian civil war began in 2011. The U.S. and its allies believed President Assad's forces were using chemical weapons against rebels and civilians, alike. However, only after the international community confirmed a major chemical weapons attack on August 21, 2013 did President Obama decide to make his call for action.⁵¹⁶

On September 6, 2013, President Obama submitted to Congress draft legislation for authorization to use force against pro-Assad forces. The proposal stipulated it constituted authorization under Sections 5(b) and 8(a)(1) of the WPR.⁵¹⁷ It would give the president authorization to use the military "as he determines to be necessary and appropriate" to prevent the "use or proliferation" of chemical weapons in and around Syria.⁵¹⁸ Congressional scholar Louis Fisher criticized the proposal as "far too broad ... Nothing in the bill limits the scope and duration of military activity."⁵¹⁹ Furthermore, Fisher noted President Obama's previous promises leading up to the 2011 air campaign in Libya in which he quickly expanded the scope of the operations from protecting

⁵¹⁵ Blanchard, Christopher M., Carla E. Humud, and Mary Beth D. Nitikin, "Armed Conflict in Syria: Overview and U.S. Response," *Congressional Research Service*, RL33487 (2014): page 8.

⁵¹⁶ Blanchard, Christopher M., et al., "Armed Conflict in Syria: Overview and U.S. Response," page 8.

⁵¹⁷ Obama draft legislation, September 6, 2013, House Doc. 115-34, 113th Congress, 1st Session.

⁵¹⁸ Obama draft legislation, September 6, 2013, House Doc. 115-34, 113th Congress, 1st Session.

⁵¹⁹ Fisher, Louis, "Syria and the Illusion of Limited War," *Boston Review*, September 10, 2013, accessed March 2, 2014, <http://www.loufisher.org/docs/syria/illusion.pdf>, page 2.

civilians to regime change as an example of the risks for escalations of commitment in military operations.⁵²⁰

The Senate Foreign Relations Committee drafted its own authorization for the use of force in Syria on September 10, 2013. It was much more limited than the draft from the Obama Administration. The bill required the president to exhaust political options before resorting to force, limited the duration of the combat to the 60 and 90-day limits of the WPR, and did not permit the use of ground forces.⁵²¹ The bill also included regular reporting requirements for the president to make to Congress.⁵²²

In the end, neither bill was necessary. On September 10, 2013, the president asked Congress to postpone the vote. While the president stated it was to pursue diplomatic options, some believed it was because he knew Congress would not vote in favor of the authorization.⁵²³ The president, however, was telling the truth. A joint U.S.-Russian proposal was in the works to place the supervision and destruction of Syria's chemical weapons in the hands of an international body.⁵²⁴ The proposal eventually became U.N. Security Council Resolution 2118, which the council adopted on September 27, 2013.⁵²⁵ The resolution called for Syria to transfer its chemical weapons under the control of the Organization for the Prohibition of Chemical Weapons (OPCW) and requested member states to provide assistance to the OPCW for inspection, removal,

⁵²⁰ Fisher, Louis, "Syria and the Illusion of Limited War," page 2.

⁵²¹ S. J. Res. 21, 113th Congress, 1st Session.

⁵²² S. J. Res. 21, 113th Congress, 1st Session.

⁵²³ Blanchard, Christopher M., et al., "Armed Conflict in Syria: Overview and U.S. Response," page 8, and Ahmed, Hisham H. 2013, "On the Perils of Unilateralism," *Against the Current* 38, no. 5: page 11.

⁵²⁴ Blanchard, Christopher M., et al., "Armed Conflict in Syria: Overview and U.S. Response," page 8, and Ahmed, Hisham H. 2013, "On the Perils of Unilateralism," page 11.

⁵²⁵ United Nations Security Council Resolution 2118 (2013), September 27, 2013, accessed on March 30, 2014, [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2118\(2013\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2118(2013)).

and disposal of the weapons.⁵²⁶ The agreement has helped to defuse the international crisis to this point. However, the Syrian civil war still continues.

What is most interesting about the Syrian conflict is President Obama's approach to request authorization from Congress versus in Libya, where he unilaterally decided to join and support the NATO air campaign. The difference in strategies is likely due to the differences in political risk and popularity of both wars. In Libya, the major European powers in NATO, Britain and France, were taking active roles in the air campaign. In Syria, while France supported military strikes, British Parliament voted against Prime Minister Cameron's call for military action.⁵²⁷ Military strikes were equally unpopular in America lacking support of both the public and Congress.⁵²⁸ Furthermore, the U.S. military anticipated the need of "thousands of special operations forces and other ground forces" to secure Syria's chemical weapons stockpiles.⁵²⁹ As a result, it was too risky politically for President Obama to unilaterally commence strikes against Syria.

President Obama and his administration believed the threat of force "was instrumental in convincing [President Assad] to commit to the disarmament plan," similar to how President Clinton used the threat of force to achieve a diplomatic solution in Haiti twenty years earlier.⁵³⁰ Louis Fisher stated President Obama "appropriately sought ... authority from Congress."⁵³¹ While President Obama disregarded the WPR in Libya, his deference to the WPR for Syria was likely genuine, due to the higher political stakes including the high probability of a ground war. Nevertheless, as has been said for other

⁵²⁶ United Nations Security Council Resolution 2118 (2013), September 27, 2013.

⁵²⁷ Ahmed, Hisham H. 2013, "On the Perils of Unilateralism," page 11.

⁵²⁸ Ahmed, Hisham H. 2013, "On the Perils of Unilateralism," page 11.

⁵²⁹ Fisher, Louis, "Holding Assad Accountable," *Constitution Daily*, September 12, 2013, page 3, accessed March 2, 2014 at <http://www.loufisher.org/docs/syria/assadac.pdf>.

⁵³⁰ Blanchard, Christopher M., et al., "Armed Conflict in Syria: Overview and U.S. Response," page 1.

⁵³¹ Fisher, Louis, "Syria and the Illusion of Limited War," page 3.

conflicts during the WPR era, a president from an earlier era may have disregarded Congress altogether. Therefore, while President Obama's actions in Libya may have weakened the WPR, his actions in Syria demonstrated the WPR still has some relevance; time will tell how much.

Part II – Empirical Analysis of the Effectiveness of the WPR

The eleven case studies I discussed in the previous part of this chapter demonstrate the differences in interpretation of the WPR by both the executive and legislative branches. While neither branch has followed a strict interpretation of the WPR, both have referenced it in their inter-branch communications. Although criticism about the WPR continues, has it been effective in minimizing presidential war as the 1973 Congress intended? Furthermore, what is the best approach with which to measure the effectiveness of the WPR?

Political scientists David Auerswald and Peter Cowhey in a 1997 study tested whether the WPR had changed presidential and congressional behavior. Auerswald and Cowhey analyzed the behaviors of both branches and the durations of military operations before and after the WPR's enactment. Their universe was all U.S. military operations between 1899 and 1995 that Congress did not preauthorize and involved greater than 500 personnel. They then broke their universe into three periods: operations from the turn of the century up to 1925; operations after World War II through 1972 (i.e., the early Cold War); and post-WPR operations through 1995.⁵³² The reason for the two periods prior to 1973 was to test the post-1973 period against a non-Cold War period “to see

⁵³² Auerswald, David P. and Peter F. Cowhey. “Ballotbox Diplomacy: The [WPR] and the Use of Force,” page 518.

whether Cold War consensus might explain congressional behavior.”⁵³³ To conduct their research, Auerswald and Cowhey used reports from the executive branch, Department of State, Senate, and the House of Representatives, as well as books by John E. Jessup, Louis Fisher, and the Institute for Defense Analyses.⁵³⁴ I agree with their methodology, and plan to analyze the results of their research, and then expand upon it to analyze the conflicts after 1995 to see if their conclusions still hold.

The results of Auerswald and Cowhey’s research found the WPR did change the behaviors of both presidents and Congress. They found for unauthorized military operations between 1900 and 1972 (i.e., before the WPR’s enactment), “none of the unauthorized conflicts ... lasted less than two and one half months, and most lasted years.”⁵³⁵ From 1900 to 1925, they noted five military operations Congress did not authorize in advance. The combat operations and subsequent occupations for these conflicts lasted between two and nineteen years.⁵³⁶ From 1926 to 1972, they noted eight operations Congress did not preauthorize. Congress would eventually authorize four of these (Vietnam, Korea, Trieste, Italy, and the Taiwan Straits), and these operations would last a combined total of over 19 years. For the remaining four operations, two lasted approximately 18 months and the other two approximately three months.⁵³⁷ Auerswald and Cowhey did not note a single case prior to 1973 where Congress challenged or overturned an unauthorized military operation.⁵³⁸ In each case, the operations lasted

⁵³³ Auerswald, David P. and Peter F. Cowhey. “Ballotbox Diplomacy: The [WPR] and the Use of Force,” page 518.

⁵³⁴ Auerswald, David P. and Peter F. Cowhey. “Ballotbox Diplomacy: The [WPR] and the Use of Force,” see works cited in footnote 25 on page 518, as well as the actual sources in the references section on pages 525-528.

⁵³⁵ Auerswald, David P. and Peter F. Cowhey. “Ballotbox Diplomacy: The [WPR] and the Use of Force,” page 519.

⁵³⁶ Auerswald, David P. and Peter F. Cowhey. “Ballotbox Diplomacy: The [WPR] and the Use of Force,” page 518.

⁵³⁷ Auerswald, David P. and Peter F. Cowhey. “Ballotbox Diplomacy: The [WPR] and the Use of Force,” page 519.

⁵³⁸ Auerswald, David P. and Peter F. Cowhey. “Ballotbox Diplomacy: The [WPR] and the Use of Force,” pages 519-520.

longer than the 60 days the WPR would give the president for operations without congressional authorization.

Auerswald and Cowhey then analyzed the operations subsequent to the WPR enactment in 1973. They noted a definitive difference in the behaviors of both branches and the duration of the operations. Between 1973 and 1995, they noted 14 conflicts without prior congressional authorization that involved over 500 personnel. Ten of these conflicts lasted less than 60 days. Congress intervened in the remaining four, all of which lasted longer than 60 days. Congress was able to pressure President Bush into requesting congressional authorization for the 1991 Persian Gulf War, and pressured Presidents Reagan and Clinton to withdraw U.S. forces from Lebanon and Somalia, respectively. In the final operation, the 1987 Persian Gulf reflagging exercises, Congress allowed the operation to continue, but succeeded in requiring greater reporting from President Reagan (see Appendix 2 for the results of Auerswald and Cowhey's study).⁵³⁹

It is clear from the work of Auerswald and Cowhey that the WPR succeeded in changing both the relationship between the executive and legislative branches in authorizing wars as well as the scope and duration of conflicts through 1995. However, I also wanted to test Auerswald and Cowhey's theories for U.S. conflicts that have arisen since the end of their study to see if their conclusions still held. In Appendix 3, I have listed the major combat operations in which the U.S. has been involved since 1995. The operations can be grouped as follows: the Iraqi no-fly zone prior to the 2003 invasion; U.S. operations in the former Yugoslavian states including Bosnia and Kosovo; the 1998

⁵³⁹ Auerswald, David P. and Peter F. Cowhey. "Ballotbox Diplomacy: The [WPR] and the Use of Force," page 520.

cruise missile strike in Sudan and Afghanistan; the War on Terror (i.e., Afghanistan, Iraq, and other anti-terror operations after 2001); and the 2011 Libyan air campaign.

The biggest difference in Auerswald and Cowhey's study of the post-1973 military operations through 1995 and my analysis of the post-1995 operations was presidents twice violated the 60-day automatic termination provision of Section 5(b) of the WPR after 1995 without consequence (i.e., Kosovo in 1999 and Libya in 2011). Aside from Kosovo and Libya, I found both the executive and legislative branches correctly utilized the WPR in conflicts after 1995. The Iraqi no-fly zone was authorized under the same law which authorized the 1991 Persian Gulf War. Congress authorized the peacekeeping operations in Bosnia and the surrounding states through multiple appropriations bills. Congress also authorized in advance the wars in Afghanistan and Iraq, as well as the ongoing anti-terrorist operations against Al Qaeda. Finally, there was only one combat operation under 60 days during this period, the 1998 air strikes in Afghanistan and Sudan in retaliation for the Al Qaeda embassy bombings in Africa. In this case, President Clinton did report the action to Congress "consistent with the [WPR]."⁵⁴⁰

The post-1995 military actions other than Kosovo and Libya were in accordance with the WPR, but did the Kosovo and Libya WPR Section 5(b) violations damage or destroy the effectiveness of the WPR? In the case of Kosovo, as I discussed in the previous section, while President Clinton exceeded the 60-day automatic termination of hostilities provision, he did report regularly to Congress, and Congress appropriated funding for the military operations. The *Campbell v. Clinton* ruling also placed the onus from the WPR back to Congress to require a president to end hostilities through a

⁵⁴⁰ Grimmett, Richard F., "The War Powers Resolution: After Thirty-Eight Years," page 61.

majority vote. As a result, the ruling likely weakened the authority of Section 5(b) for an automatic termination of hostilities, but did not eliminate Congress' ability under Section 5(c) to force a president to terminate hostilities via a concurrent resolution and create a constitutional impasse. Therefore, *Campbell v. Clinton* ruling redefined the WPR to take a more traditional approach to war powers (via a vote in Congress), but did not destroy it. Since Congress did not have the votes to terminate the air campaign in Kosovo, and had in fact appropriated funds for it, the president was within his power to continue it.

When the Libyan air campaign began 12 years later, Congress was likely not able to rely on Section 5(b) to terminate the air strikes (as a result of the *Campbell* ruling). Furthermore, as Congress was divided with the Democrats controlling the Senate and the Republicans controlling the House, it could not muster the votes to use a concurrent resolution to end the fighting. There were also no efforts in Congress to use the power of the purse to terminate the air strikes. Rather, the debates in both chambers revolved around the scope of the campaign. As I previously noted, while a small group of congressmen tried to sue President Obama to end the war, the courts ruled the suit lacked standing. President Obama, for his part, did report regularly to Congress in accordance with the WPR. Therefore, I believe the Libyan air campaign was in accordance with the WPR under its revised requirements as a result of the 1999 *Campbell* ruling. Since Congress was unable to vote down the president's decision, the operation should fall within his constitutional authority as Commander in Chief.

I believe Auerswald and Cowhey's conclusions still hold through the post-1995 conflicts. The executive branch still cites the WPR in its reports to Congress, and

Congress cited authorization under the WPR in its authorizations for military force in Afghanistan and Iraq, Public Laws 107-40 and 107-243, respectively. Furthermore, Presidents Clinton and Obama did not escalate or expand combat operations beyond air strikes in Kosovo and Libya, respectively. It is likely that the presidents feared potential constitutional showdowns as the House in both cases expressed its unwillingness to authorize ground operations through one-chamber resolutions. I believe this is evidence that presidents in the post-WPR era recognize Congress as more of a partner in major war powers matters, which was not the case prior to 1973.

Auerswald and Cowhey could not foresee the *Campbell v. Clinton* ruling, and how it would change the WPR. However, it is hard to disagree with the ruling, as it returned the WPR to a traditional separation of powers approach. One can argue that the *Campbell* ruling strengthened the WPR as it likely nullified the constitutionally-questionable Section 5(b). Therefore, while the WPR still is not followed as intended, it continues to influence the behaviors of both presidents and Congress.

Part III – Has the War Powers Resolution been Effective?

In the early 1970s, the House of Representatives attached a background section to most of its proposed WPR legislation in which it explained the necessity for the legislation. The section stated the House had found through its congressional hearings “the constitutional ‘balance of authority’ over war making had swung heavily to the President in modern times.”⁵⁴¹ The House hoped by enacting war powers legislation both the president and Congress would be able to fulfill their constitutional responsibilities and “work together in mutual respect and maximum harmony toward their ultimate, shared

⁵⁴¹ H. Rpt. 383, 92nd Congress, 1st Session, page 3.

goal of maintaining the peace and security of the Nation.”⁵⁴² The question now is did Congress succeed in its goal after passing the WPR as Public Law 93-148?

We now have over 40 years of history with which to evaluate the WPR. Over this time, the WPR has evolved through historical precedent of use and court rulings. The courts have had a major impact on the WPR, first in ruling war powers cases are justiciable (*Dellums v. Bush*), and by repeatedly stating modern war powers lawsuits were not “ripe” for the courts to hear if Congress had not exhausted all remedies available to it. The *Campbell v. Clinton* ruling made this definitive by stating there must be a “true constitutional impasse” before coming to the courts.⁵⁴³ As a result, the onus is now on Congress to fulfill its constitutional responsibilities and vote on war powers matters instead of relying on Section 5(b) of the WPR.

The executive branch has refined its WPR position over the past 40 years. While presidents have done a reasonably good job keeping Congress informed on WPR-related matters, their position has become to avoid citing Section 4(a)(1) deployments and thus evade the 60-day termination of hostilities clock under Section 5(b). Presidents also claim authorization from international bodies such as the U.N. allowing its member states “to take all necessary measures” give them authority to bypass Congress. Through the OLC, executive branch positions have claimed low-intensity conflicts, or conflicts that do not involve ground forces, do not meet the definition of hostilities in the WPR, thus stating the WPR did not apply. They also cite appropriations as evidence of congressional authorization claiming the 1971 *Orlando v. Laird* ruling trumps the Section 8 anti-appropriation language in the WPR. A final traditional executive branch

⁵⁴² H. Rpt. 383, 92nd Congress, 1st Session, page 2.

⁵⁴³ *Campbell v. Clinton*, 52 F. Supp. 2d 34.

position has been it is unnecessary to obtain congressional authorization for non-combat deployments, citing congressional acquiescence in these deployments and the decision in the 1981 *Dames & Moore v. Regan* case.

Critics have long cited the Section 4(a)(1) loophole as a weakness of the WPR. This loophole may be moot now anyway due to the *Campbell v. Clinton* ruling. Nevertheless, it is a smart tactic legally and politically for the executive branch to continue to avoid citing a specific clause of Section 4(a)(1) to avoid future liability. I have previously discussed that the executive branch is incorrect in believing it can bypass congressional authorization on authority of international bodies. While many presidents have taken this position, and will likely continue to do so, it is incorrect from a legal standpoint. Congress has never stepped aside when presidents have used this position. Even while Congress was unable to reach a consensus between the two chambers during the 2011 Libyan air campaign (in which President Obama cited authorization under the U.N. and NATO), it was able to put pressure on the president to avoid placing forces on the ground and provide greater presidential reporting.

The executive branch is likely correct that the courts would uphold congressional appropriations as evidence of authorization. The courts already ruled in favor of this in the *Orlando v. Laird* case. Although this ruling was two years prior to the WPR anti-appropriation language in Section 8, it is likely the courts would not only maintain this position, but continue on the path set by the *Campbell v. Clinton* ruling and disregard language in the WPR in favor of a congressional action, such as authorizing appropriations.

The executive branch is also correct that presidents can deploy U.S. forces in non-combat operations without congressional authorization. Congress has typically not intervened in non-combat deployments and the Supreme Court rulings in *U.S. v. Midwest Oil Company* and *Dames & Moore v. Reagan* support the position of executive authorization through congressional acquiescence. Additionally, the WPR does not place termination requirements on deployments in which U.S. forces are not subject to hostilities or imminent hostilities. Therefore, it would be difficult legally for Congress to place any limitations on a president's authority in this area.

Congress, for its part, has been definitive in using the WPR when it has mattered most; deliberating authorization under the WPR for major wars such as the 1991 Persian Gulf War and wars in Afghanistan and Iraq. However, Congress has been very inconsistent in its application of the WPR with conflicts short of major war. In these situations, the two chambers have had difficulty agreeing on a uniform position, even when both chambers were under control of the same party.

Nevertheless, Congress has done a good job in preventing presidents from escalating conflicts with limited upside such as in Lebanon, Somalia, Yugoslavia, Libya, and Syria. If this is to be the WPR's legacy, it is an excellent legacy to have. I have quoted the opinions of several scholars who believe pre-WPR Congresses may have stepped aside and allowed presidents to escalate conflicts such as these similar to what happened in Korea and Vietnam. While the results of congressional applications of the WPR have been mixed, the WPR restored modern Congresses with a confidence that earlier Congresses had lost in asserting themselves against the executive branch. As a result, I believe the WPR has been effective. While neither branch may be following the

WPR to the letter, both branches have established boundaries through their historical actions and the country has to date avoided presidentially-escalated wars on the scale of Korea and Vietnam.

David Auerswald and Peter Cowhey wrote of the WPR, “The Act as a piece of legislation has few defenders.”⁵⁴⁴ The WPR was born out of controversy after Congress had to override President Nixon’s veto of it. Since then, every president, with the exception of President Obama, has considered the WPR an unconstitutional infringement on their authority.⁵⁴⁵ The WPR has its detractors in Congress as well. After the showdown between Congress and President Clinton over operations in Somalia, both Senators Biden and Byrd called the WPR a failure.⁵⁴⁶

The criticisms against the WPR are long. From a constitutional standpoint, detractors believe it is an abdication of war making authority to the president.⁵⁴⁷ From a legal standpoint, many criticize the actual text saying it weak and contradictory.⁵⁴⁸ Many believe the Supreme Court’s ruling in *I.N.S. v. Chadha* invalidated the WPR’s key termination of hostilities provision.⁵⁴⁹ This is still subject to debate as Section 5 has never been tested in court. Additionally, the judicial rulings in *Dellums v. Bush* and *Campbell v. Clinton* may have weakened that claim as the courts will hear war powers cases when the branches have reached a constitutional impasse. The House would not

⁵⁴⁴ Auerswald, David P. and Peter F. Cowhey. “Ballotbox Diplomacy: The [WPR] and the Use of Force,” page 506.

⁵⁴⁵ Grimmatt, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 6, see footnote 681 for the Obama Administration’s position on the WPR.

⁵⁴⁶ Ford, Christopher A., “War Powers as we live them,” page 45.

⁵⁴⁷ Auerswald, David P. and Peter F. Cowhey. “Ballotbox Diplomacy: The [WPR] and the Use of Force,” page 506, and Gray, David and Louis Fisher, “The [WPR], Time to Say Goodbye,” pages 3, 6.

⁵⁴⁸ Gray, David and Louis Fisher, “The [WPR], Time to Say Goodbye,” page 1.

⁵⁴⁹ Glennon, Michael J., “The War Powers Resolution Ten Years Later: More Politics than Law,” *The American Journal of International Law*, Volume 78, No. 3 (1984), page 577.

have introduced a bill in 2011 to require President Obama to pull U.S. forces out of Libya under Section 5(c) of the WPR if there was a possibility it was invalid.

From an application standpoint, critics cite as a failure the loophole in Section 4 where presidents have avoided citing Section 4(a)(1) which activates the automatic termination of hostilities provisions in Section 5.⁵⁵⁰ Critics also cite how presidents have begun to follow a “script” where they cite their reports are “consistent” with the WPR.⁵⁵¹ Furthermore, presidents avoid consulting with Congress as the WPR requires, but only inform it of pending and ongoing operations. Others claim the WPR curtails a president’s ability to act in emergencies – “it would prevent the President from reacting immediately even to attacks on Canada or Mexico.”⁵⁵²

Louis Fisher and David Adler believe Congress should return to the traditional checks and balances of government, including impeachment, to oversee war powers. In their words, “outright repeal would be less risky than continuing along the current path.”⁵⁵³ They may be correct. However, the *Campbell v. Clinton* ruling likely redefined the WPR more along these lines. What Fisher and Adler should be more concerned about is Congress’ inability to achieve consensus as a body against the executive branch in war matters. I will discuss this issue in Chapter 3.

Many scholars believe it is too easy to dismiss the WPR outright, even in the face of so much criticism. In their opinions, critics of the WPR are not evaluating the actual behaviors of presidents and Congress since the WPR became law in 1973. Congress has not had to force presidents to withdraw troops in military operations because they have

⁵⁵⁰ Auerswald, David P. and Peter F. Cowhey. “Ballotbox Diplomacy: The [WPR] and the Use of Force,” page 512.

⁵⁵¹ Nathan, James A., “Salvaging the War Powers Resolution,” page 245.

⁵⁵² Rushkoff, Bennett C., “A Defense of the War Powers Resolution,” page 1330.

⁵⁵³ Gray, David and Louis Fisher, “The [WPR], Time to Say Goodbye,” page 1.

either been satisfied with the operations, particularly in short-term operations, or have worked with the presidents to achieve a dialogue and arrive at an acceptable course of action and authorization. I agree with this position.

David Auerswald and Peter Cowhey believe presidents realize domestic infighting weaken the U.S.' credibility internationally, and therefore either tailor military operations to either be short in duration or work with Congress for authorization for larger, longer operations.⁵⁵⁴ Eileen Burgin noted Congress closely scrutinized every presidential troop deployment in the 1980s leading up to the Panama invasion.⁵⁵⁵ She noted while Congress was out of session at the time of the invasion, it did not invoke the WPR because it was satisfied with the result of the operation.⁵⁵⁶ As a result, one senior congressional aide stated the WPR "is not nothing."⁵⁵⁷

Constitutional law professor Peter Shane noted a significant change in the behavior of Congress in the post-Vietnam era – "Congress used the WPR and its own claims to authority to force the executive to sharpen its articulation of American objectives, respond to contrary positions with regard to the executive branch's foreign policy analyses, and share substantial information with Congress. In every case, the country experienced a better informed and more substantial intra-government debate over military policy than the executive mustered in the Vietnam era."⁵⁵⁸

⁵⁵⁴ Auerswald, David P. and Peter F. Cowhey. "Ballotbox Diplomacy: The [WPR] and the Use of Force," pgs. 3-4.

⁵⁵⁵ Burgin, Eileen, "Congress, the War Powers Resolution, & the Invasion of Panama," page 232.

⁵⁵⁶ Burgin, Eileen, "Congress, the War Powers Resolution, & the Invasion of Panama," pages 235, 239.

⁵⁵⁷ Burgin, Eileen, "Congress, the War Powers Resolution, & the Invasion of Panama," page 232.

⁵⁵⁸ Shane, Peter M., "Learning McNamara's Lessons," page 13.

Ellen Collier found the WPR “remains in the Executive’s field of vision.”⁵⁵⁹ She noted presidents do cite the WPR in their reports to Congress, thus acknowledging its relevance. In her opinion, were it not for congressional intervention in operations such as Lebanon and the Persian Gulf War, the scope and duration of those operations could have been much worse – “the [WPR] is a ‘moral firebreak’ that clearly gives an incentive to the Executive to pause before taking recourse to arms.”⁵⁶⁰

What about the textual flaws of the WPR, particularly the Section 4(a)(1) loophole? Christopher Ford believes it is not clear either side wants strict compliance with the WPR.⁵⁶¹ He believes the ambiguity of the WPR helps establish boundaries for the executive and legislative branches while “leaving conceptual space in which the statute's commands neither obviously apply nor fail to do so.”⁵⁶² As a result, both branches can avoid constitutional showdowns while using the ambiguity (or flexibility) of the WPR to chart a politically-desirable course of action through the complexities of each foreign policy crisis.⁵⁶³ The WPR will always be a controversial piece of legislation. While the WPR may not be a perfect piece of legislation, it has created a better dialogue between the two branches in charting a course for the nation in times of war.

The founders of the WPR hoped it would help the U.S. avoid another Vietnam. Unfortunately, the U.S. did endure another type of Vietnam-style war after the WPR’s enactment in 1973, this time in Iraq from 2003 to 2011. However, in the case of Iraq,

⁵⁵⁹ Collier, Ellen, "The War Powers Resolution; A Decade of Experience," Congressional Research Service, Report, No. 84-22, July 25, 1986, as cited in Nathan, James A., “Curbing the Distress of War,” page 626.

⁵⁶⁰ Collier, Ellen, "The War Powers Resolution; A Decade of Experience," Congressional Research Service, Report, No. 84-22, July 25, 1986, as cited in Nathan, James A., “Curbing the Distress of War,” page 626.

⁵⁶¹ Ford, Christopher A., “War Powers as we live them,” page 8.

⁵⁶² Ford, Christopher A., “War Powers as we live them,” page 53.

⁵⁶³ Ford, Christopher A., “War Powers as we live them,” page 52.

Congress authorized military action in advance of hostilities in accordance with the WPR. Therefore, the war in Iraq was not the result of an unauthorized presidential military expedition run amok, but one in which Congress did deliberate. One can conclude the WPR worked in the case of the war in Iraq, although questions will always remain over the justifications for the invasion.

No piece of war powers legislation will be perfect due to the vagueness of the Constitution. However, the WPR has undeniably rebalanced the war powers relationship between the executive and legislative branches. It gives presidents the flexibility to act in short-term operations in which Congress would prefer to avoid.⁵⁶⁴ It also ensures Congress has a seat at the table for large conflicts, in which the Constitution requires congressional action. As Christopher Ford concludes, “can we really say that [the WPR] has failed so dramatically?”⁵⁶⁵

⁵⁶⁴ Ford, Christopher A., “War Powers as we live them,” page 51.

⁵⁶⁵ Ford, Christopher A., “War Powers as we live them,” page 53.

Chapter 3

The War Powers Resolution – An Analysis of its Future Effectiveness

Introduction

The 1973 Congress wrote the WPR with traditional, conventional wars in mind, such as Vietnam. They could not foresee the partisan nature of today's politics and how it could weaken the legislative branch's ability to mobilize to counter a future president's actions. They did not address counter-terrorism and other covert operations that are short in duration, but can have significant political consequences. And most significantly, the drafters could not foresee how modern technology would change warfare. The U.S. is now able to wage war at a distance through drones, long-range missiles, and cyber whose inflicted damage is very real but does not pose any immediate risk to U.S. personnel.

In my final chapter, I look at what the future holds for the WPR. There have been multiple attempts to amend or repeal the WPR since 1973. However, none of these attempts were successful. I will first review the traditional criticisms of the WPR and major attempts at reform or repeal. I will then discuss why no president or Congress has been successful in any reform attempt. I then analyze the applicability of the WPR towards modern weapons and warfare. I end this chapter by analyzing the president and Congress' modern interpretations of the WPR.

In conclusion, I believe it is very unlikely that any war powers reforms will take place due to the political stakes involved for both branches. As a result, both future presidents and Congresses will need to continue to work within the WPR's frameworks, including determining how best to authorize covert operations and ones involving the use of advanced weapons. I also believe that as future presidents will always be willing to

assert themselves in matters of war, it is up to Congress to also assert its constitutional prerogatives, something it has struggled to do since passing the WPR in 1973.

Part I – Efforts to Amend or Repeal the WPR

It is little surprise that a law as controversial as the WPR has been the target of many calling for amendments or its repeal. Critics of the WPR fall into two groups: those that favor more authority for the executive branch and those that favor more for Congress. Within these groups, calls for WPR reforms can vary from minor changes to outright repeal. Many calls for change have focused on amending the WPR to correct the constitutional and other criticisms of the WPR sections which I explained in Chapter 1. A second source of calls for change aim to expand the reach of the WPR over non-conventional warfare to better equip it for challenges in the 21st century. However, the presidents and Congresses of the post-WPR area have not passed any reforms into law. In this section, I will discuss the key areas in which critics have attempted to revise the WPR and highlight several significant proposals to overhaul the WPR. I will also explain both why no measures have become law and prospects for reform in the future.

A. Key Proposed Changes to the WPR

As I discussed in Chapter 1, critics have noted deficiencies in nearly every section of the WPR. Members of Congress and constitutional scholars have pressed for changes to the WPR to correct these deficiencies. Some of the key proposed changes are as follows:

- The WPR should expand the types of military operations that the president may unilaterally pursue (Section 2);
- The presidential consulting requirements to Congress should be strengthened (Section 3);
- Congress should refine the WPR’s definition of hostilities, and its scope should expand to include the following operations: covert; strike; and operations that involve advanced weaponry (e.g., drones, cyber, etc.) (Section 4);
- The WPR should be self-executing or include a second trigger (Section 5);
- Congress should clarify the circumstances under which it can use the legislative veto (Section 5);
- The WPR should include an appropriations cutoff (Section 8); and
- The WPR should include criminal penalties and court procedures for members of Congress to bring the executive branch into court.

I will discuss each of these proposals in more detail below.

1. Expansion of the Scope of Presidential Unilateral Uses of Force

As I have previously discussed, Section 2(c) of the WPR states the president may introduce the U.S. military into hostilities pursuant to “(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”⁵⁶⁶ Many believe this language unconstitutionally limits the scope of a president’s ability to unilaterally wage war as Commander in Chief. Some proposals to amend the WPR, such as the 1995 Use

⁵⁶⁶ Public Law 93-148, page 1 (see Appendix 1).

of Force Act and War Powers Consultation Act of 2009 (I will discuss both later in this section), aim to expand the circumstances in which presidents may use force to include rescuing citizens abroad, participating in operations sanctioned by the U.N. and NATO, and preemptively strike to prevent attacks on U.S. interests.⁵⁶⁷

As I discussed in Chapter 1, Section 2(c) is controversial, but is likely non-operative and therefore does not limit presidents. Furthermore, both the Founding Fathers and the courts have sided with the executive branch that presidents may use force to rescue citizens abroad, so while this is not in the text of the WPR, presidents can likely order rescue operations with little fear of retribution. Presidentially-ordered preemptive strikes, on the other hand, are a slippery slope, with the potential to act as a loophole for presidents to initiate offensive war. It is unlikely Congress would be in support of broadening the president's authority in this area.

2. Improved Presidential Consulting Requirements

As I discussed in the Chapter 2 case studies, presidents have created an established practice of providing Congress with last-minute notification of the commencement of hostilities without consultation in lieu of the Section 3 requirements. As I noted in Chapter 1, Section 3 has critics from both camps as it may unconstitutionally delegate war making powers from Congress to the president, while also infringing on a president's authority as Commander in Chief. Further criticisms of this section are it is vague as to when the president must consult with Congress and does not state how many members of Congress require consultation; loopholes presidents have

⁵⁶⁷ Glennon, Michael J., "The War Powers Resolution Ten Years Later: More Politics than Law," page 15, National War Powers Commission Report, Miller Center of Public Affairs, accessed February 15, 2015, <http://millercenter.org/policy/commissions/warpowers>, pages 35, 36.

regularly exploited.⁵⁶⁸ The 1973 Congress which passed the WPR expected consultation to be much more than being informed.⁵⁶⁹ As a result, the pro-Congress WPR camp has tried to strengthen the consulting requirements.

Most revisions for Section 3 center around tightening the instances in which reporting is required and forming a permanent congressional consultative group, which would include congressional leadership and various other senior members of Congress such as in Representative Lee Hamilton's Consultation Act of 1993.⁵⁷⁰ Proponents of a consultative group believe it will improve communication between the executive and legislative branch as it will clarify with who the president must consult and how often. However, there are many of criticisms of taking consultation out of the hands of the entire Congress and putting it in the hands of the few. Louis Fisher infers it is unconstitutional to place matters of war outside of the entire Congress citing the equality of all members of Congress in votes – “the decision to go to war is for all of Congress, not for a subset of the legislative body.”⁵⁷¹ Michael Glennon further warned against the use of a congressional group citing the dangers of groupthink and the previously reached conclusions and biases of small groups; something the full legislative body would counter.⁵⁷²

⁵⁶⁸ Grimmett, Richard F., “War Powers Resolution: Presidential Compliance,” page 21.

⁵⁶⁹ Nathan, James A., “Salvaging the War Powers Resolution,” page 246.

⁵⁷⁰ H. R. 3405, 103rd Congress, pages 1-4.

⁵⁷¹ Fisher, Louis, “War Powers for the 21st Century: The Constitutional Perspective,” (Statement before the House Committee on Foreign Affairs, Washington, DC, April 10, 2008), pages 6 and 7.

⁵⁷² Glennon, Michael J., *Constitutional Diplomacy*, Princeton: Princeton University Press, 1990, page 311.

3. Revision of the Definition and Scope of Hostilities

The Section 4(a) loophole and the executive branch's efforts to question the definition of hostilities are two of the biggest weaknesses of the WPR. Major proposals have been made to revise Section 4. The proposals include defining hostilities to eliminate that loophole and to expand the definition to include the following types of operations: covert, strike, and those that involve advanced weaponry (e.g., drones, cyber, etc.). The present interpretation of the WPR is it only applies to U.S. military personnel in combat. The post-WPR rise of counter terrorism and other covert operations, as well as the use of advanced weaponry (which do not require U.S. personnel to be in harm's way), have created situations which most believe do not fall under the WPR's purview.⁵⁷³ Because covert operations and advanced weaponry warfare have become a significant (and controversial) component of U.S. national security, I will discuss them in separate sections later in this chapter. In this section, I will focus in this section on defining hostilities and strike operations.

As I discussed in Chapter 2, State Department Legal Advisor Harold Koh picked apart the WPR's lack of a definition of hostilities during a 2011 congressional hearing on war powers and Libya. In Koh's words, "the operative term, 'hostilities,' is an ambiguous standard, which is nowhere defined in the statute," and the administration's interpretation, "is correct, and confirmed by historical practice."⁵⁷⁴ One recommendation to revise the definition of hostilities was "to embody more clearly either liberal or realist

⁵⁷³ For examples, Covert Operations – see Glennon, Michael J., *Constitutional Diplomacy*, page 117, National War Powers Commission Report, Appendix I, Miller Center of Public Affairs, pages 20-21, Nathan, James A., "Salvaging the War Powers Resolution," pages 244, 251, Nathan, James A., "Curbing the Distress of War: An Outline for a War Powers Resolution that Works," pages 622 and 623; Drones – Grimmett, Richard F., "The War Powers Resolution: After 38 Years," pages 49-50, and United States Senate. *Libya and War Powers*. S. HRG. 112-89, pages 2, 35.

⁵⁷⁴ United States Senate. *Libya and War Powers*. S. HRG. 112-89, pages 9 and 13.

assumptions, but not both.”⁵⁷⁵ This scholar recommended defining hostilities as “deliberate combat, either by or directed against [U.S.] forces,” or through “a particular magnitude of [U.S.] casualties.”⁵⁷⁶ However, measuring hostilities by casualties is risky as sporadic casualties can occur during a large military buildup such as in Lebanon. Michael Glennon noted this risk when he stated, “a gradual escalation of hostilities can generate serious confusion about when the time limit is triggered.”⁵⁷⁷ Another option came from the National War Powers Commission, which I will discuss in more detail below. The commission recommended defining hostilities as “combat operations lasting, or expected to last, more than one week.”⁵⁷⁸ However, this definition would continue to leave the door open for exclusion of limited, sporadic operations such as those Harold Koh stated would not be applicable to the WPR.⁵⁷⁹

There is also debate about whether the WPR should be amended to include strike operations, such as strikes similar to President Clinton’s 1998 cruise missile strike against Al Qaeda or President Obama’s 2011 raid to kill Osama Bin Laden. While the aforementioned operations were legal, the former being a retaliatory strike and the latter a congressionally-authorized strike under the 2001 Authorization to Use Military Force (AUMF), they are examples of potential strikes that many believe presidents should first clear with Congress. The reason is that as strikes will typically involve violating the sovereignty of foreign nations, a unilateral presidential strike could have serious foreign policy implications for the nation. However, as one scholar states, “the WPR has effectively delegated discretion to the executive,” due to the 60-day window Section 5(b)

⁵⁷⁵ "Realism, Liberalism, and the War Powers Resolution." *Harvard Law Review* 102, no. 3 (January 1989), page 650.

⁵⁷⁶ "Realism, Liberalism, and the War Powers Resolution," pages 650-651.

⁵⁷⁷ Glennon, Michael J., *Constitutional Diplomacy*, page 114.

⁵⁷⁸ National War Powers Commission Report, Miller Center of Public Affairs, page 8.

⁵⁷⁹ United States Senate. *Libya and War Powers*. S. HRG. 112-89, pages 9-10, 14-16.

gives to presidents.⁵⁸⁰ Instead, this scholar recommends Congress make a commitment keep presidents in check with post-mortem hearings “to merit public confidence in the decisions ultimately reached.”⁵⁸¹ There are problems with this recommendation as well since Congress will be less likely to hold congressional inquiries against a president of the same party. I will discuss the weakness of Congress as a check against the president in Part III of this chapter.

4. Make the WPR Self-Executing or Include a Second Trigger

One of President Nixon’s primary criticisms when he vetoed the WPR, as well as a criticism of many of its opponents in Congress, was the WPR did not require Congress to act to trigger the 60-day clock.⁵⁸² Furthermore, as I stated in Chapter 1, perhaps the biggest weakness of the WPR was Congress assumed presidents would willingly report actual or imminent hostilities under Section 4(a)(1). As a result, some have called for the WPR to be self-executing, or include a second trigger for Congress. While a self-executing WPR would be stronger than the current version, one which Congress actually triggers would “[make] U.S. diplomacy more credible,” give Congress “a meaningful role in the formulation of policy,” and “make enforcement easier in the courts.”⁵⁸³

The WPR actually already has a second trigger for Congress: Section 5(c), which requires the president to withdraw U.S. forces if Congress passes a concurrent resolution. While the constitutionality of this section is uncertain due to the *I.N.S. v. Chadha* ruling, a concurrent resolution by Congress would create the “true constitutional impasse”

⁵⁸⁰ Shane, Peter M., “Learning McNamara's Lessons,” page 14.

⁵⁸¹ Shane, Peter M., “Learning McNamara's Lessons,” page 14.

⁵⁸² H. R. Doc. 93-171, pages 1, 2, Wald, Martin, “The Future of the War Powers Resolution,” page 1440.

⁵⁸³ Wald, Martin, “The Future of the War Powers Resolution,” pages 1443-1444.

required by the courts in the *Campbell v. Clinton* ruling to make the case justiciable.⁵⁸⁴

To prevent presidents and courts calling a congressional concurrent resolution an unconstitutional legislative veto, one scholar recommends requiring a congressional vote at the outset of any military operation.⁵⁸⁵ Until the courts hear a case that meets this criteria, it is unlikely we will have any resolution to the constitutionality of this trigger in the WPR.

5. Appropriations

As discussed in Chapter 1, the 1971 appellate court ruling in *Orlando v. Laird* found congressional appropriations for the Vietnam War constituted authorization to the executive branch to continue the war. The WPR tried to counter this through Section 8(a)(1), which states authorization cannot be inferred from appropriations that did not specifically authorize combat operations.⁵⁸⁶ This section has never been challenged in court, however it is likely it would not hold up against the *Orlando v. Laird* ruling, particularly in circumstances such as in Yugoslavia where Congress was authorizing appropriations for overseas contingency operations while not formally authorizing hostilities.

Some critics have proposed adding a termination of funding provision to the WPR if the president did not comply with the WPR's provisions. However, this is controversial as it legally may be unconstitutional to obligate a future Congress in this manner, and Congress may want to avoid public opinion crises where it is found to pull

⁵⁸⁴ *Campbell v. Clinton*, 52 F. Supp. 2d 34.

⁵⁸⁵ Nathan, James A., "Salvaging the War Powers Resolution," page 253.

⁵⁸⁶ Public Law 93-148 (see Appendix 1).

funding on U.S. forces engaged abroad.⁵⁸⁷ Another proposal is to prohibit the use of backdoor financing through other sources, which Section 8(a)(1) should prevent against, but what all presidents do, particularly in short operations.⁵⁸⁸ It appears any potential option Congress takes in this area would raise legal controversy. Further, I believe it is inappropriate for Congress to focus on appropriations as it can avoid all legal and constitutional showdowns if it would only pass a resolution in favor or against hostilities, something Congress has done only once (Lebanon in 1983).

6. Increased Involvement of the Courts in War Powers Matters

As discussed, the *Campbell v. Clinton* ruling has in essence made it mandatory for Congress to vote as a body against a president's actions before the case will be justiciable. Nevertheless, there have been calls, such as by political scientist Nathan James, to amend the WPR to include criminal penalties and court procedures for hearing war powers cases.⁵⁸⁹ However, even this scholar states, "clearly, the right to be in court when it comes to war powers issues would be helped if there were meaningful numbers that turned up or signed a petition."⁵⁹⁰ This again leads Congress to the need to vote as a body. Michael Glennon has stated Congress cannot legally force the courts to ignore political questions in determining justiciable cases. He has recommended a "nonbinding, sense-of-the-Congress statement," which again would require Congress to vote as a

⁵⁸⁷ National War Powers Commission Report, Appendix 1, Miller Center of Public Affairs, page 21.

⁵⁸⁸ Nathan, James A., "Salvaging the War Powers Resolution," pages 252-253.

⁵⁸⁹ Nathan, James A., "Curbing the Distress of War," Outline that Works, pages 625-626.

⁵⁹⁰ Nathan, James A., "Curbing the Distress of War," Outline that Works, page 626.

body.⁵⁹¹ At this point, it seems beyond question Congress must pass a resolution before it can bring the executive branch into court in war powers cases.

B. Significant Attempts to Amend or Repeal the WPR

The previous section discussed key areas of the WPR that critics have tried to change. In this section, I discuss some of the more prominent attempts to amend or repeal the WPR. Most attempts were never been brought to a vote in both chambers and Congress has never sent a bill to the president for signature.

1. Byrd-Warner – WPR Amendments of 1988 – S. J. Res. 323, 100th Congress

The first significant WPR amendment bill to which most WPR scholars refer is the bill Senators Byrd and Warner co-sponsored in 1988. The bill would have repealed the executive action-constraining Section 2(c), the WPR time limits in Section 5(b), and the legislative veto in Section 5(c).⁵⁹² The bill is best known for the recommendation to create a permanent consultative group (PCG), which would include the senior congressional leadership, as well as the committee chairmen and ranking minority members of the House and Senate Foreign Affairs (Relations), Armed Services, and Intelligence Committees.⁵⁹³ The bill also included procedures for judicial review and prohibition on the use of appropriated funds.⁵⁹⁴ Criticisms of the bill include eliminating the 60 to 90-day clock, retaining vague language for when the president must consult

⁵⁹¹ Glennon, Michael J., “The War Powers Resolution Ten Years Later: More Politics than Law,” pages 579-580.

⁵⁹² S. J. Res. 323, 100th Congress, 2nd session, pages 2 and 5.

⁵⁹³ S. J. Res. 323, 100th Congress, 2nd session, page 3.

⁵⁹⁴ S. J. Res. 323, 100th Congress, 2nd session, pages 7-8.

with the PCG, and not requiring consultation for covert and hostage rescue operations.⁵⁹⁵ Despite reintroducing the bill in 1989, Congress never acted on it. Ironically, President Clinton signed a presidential directive in 1994 to support legislation that would amend the WPR with the Byrd-Warner provisions.⁵⁹⁶

2. Dole – Peace Powers Act – S. 5, 104th Congress – 1995

In 1995, Senate Majority Leader Bob Dole introduced his own WPR bill named the Peace Powers Act of 1995. It would place Congress in more of an advisory/oversight role. The bill began by repealing the WPR in its entirety. In its place, it reinstated word for word the WPR's Section 3 reporting requirement and the circumstances under which reports would be necessary from Section 4(a).⁵⁹⁷ However, in Senator Dole's bill, all three parts of Section 4(a) would require a report. The bill also required the president to obtain approval from Congress for all U.N.-sanctioned military and peacekeeping operations, both for deployment of U.S. forces and expenditure of funds.⁵⁹⁸ Auerswald and Cowhey believed placing restrictions on the president's ability to use funds for U.N.-sanctioned operations could "hurt presidential credibility in future conflicts."⁵⁹⁹ This bill was the only one of the three 1995 WPR proposals I discuss in this section to have had a congressional hearing, which was likely due to the 104th Congress' inability to determine a course of action on the WPR.⁶⁰⁰

⁵⁹⁵ National War Powers Commission Report, Appendix 1, Miller Center of Public Affairs, pages 22-23, and Nathan, James A., "Curbing the Distress of War," page 622.

⁵⁹⁶ Grimmett, Richard F., "War Powers Resolution: Presidential Compliance," page 22.

⁵⁹⁷ S. 5, 104th Congress, 1st Session, pages 1-4.

⁵⁹⁸ S. 5, 104th Congress, 1st Session, pages 4-12.

⁵⁹⁹ Auerswald, David P. and Peter F. Cowhey. "Ballotbox Diplomacy: The [WPR] and the Use of Force," page 525.

⁶⁰⁰ Grimmett, Richard F., "War Powers Resolution: Presidential Compliance," page 22.

3. Hyde – Repeal of the WPR – Amendment to H.R. 1561, 104th Congress – 1995

On June 7, 1995, Representative Henry Hyde proposed an amendment to the American Overseas Interest Act of 1995 (H.R. 1561) which would have repealed the WPR. In its place the amendment proposed a bill similar to Senator Dole's. The amendment used the original WPR text from Sections 3 and 4(a). However, Representative Hyde's bill did not include Senator Dole's special provisions for U.N. operations and funding.⁶⁰¹ The amendment kicked off a very interesting two-hour debate in the House about the effectiveness and necessity of the WPR. From the comments of some of the congressmen, Representative Hyde's amendment to repeal the WPR was unexpected.

The debate swung between comments that the bill was ineffective, to Congress should rely on the power of the purse to curtail presidential war, to the bill has changed presidential behavior.⁶⁰² The climax of the debate was when Speaker of the House Newt Gingrich made his push to repeal the WPR. Speaker Gingrich's comments are remarkable and worth repeating in full due to both the partisan hostility between Congress and President Clinton at this time and because he as Speaker was calling on Congress to concede power to the executive branch –

*"I think the American nation needs to understand that as Speaker of the House and as the chief spokesman in the House for the Republican party, I want to strengthen the current Democratic President because he is the President of the United States. And the President of the United States on a bipartisan basis deserves to be strengthened in foreign affairs and strengthened in national security. He does not deserve to be undermined and cluttered and weakened."*⁶⁰³

⁶⁰¹ "Section 2707. Repeal of the War Powers Resolution," *Congressional Record – House* (June 7, 1995), page 15191.

⁶⁰² "Section 2707. Repeal of the War Powers Resolution," *Congressional Record – House* (June 7, 1995), pages 15193, 15194, and 15209.

⁶⁰³ "Section 2707. Repeal of the War Powers Resolution," *Congressional Record – House* (June 7, 1995), page 15209.

Immediately after Speaker Gingrich's speech, the House voted against repealing the WPR by a very slim margin – 201-217.⁶⁰⁴ Louis Fisher believed the vote to repeal failed for two reasons: 1) It is possible a full repeal of the WPR would have attracted more votes as the pro-Congress and pro-president camps would have united to eliminate what they all felt was a bad law, versus only a partial repeal which still required consultation; and 2) Gingrich's call to strengthen the powers of President Clinton may have actually "repelled" Republican congressman as 44 members did not support the Speaker's proposal.⁶⁰⁵

4. Biden – Use of Force Act – S. 564, 104th Congress – 1995

The Use of Force Act, on which Senator Joe Biden was the lead sponsor, originated in the late 1980s when Senator Biden chaired a special war powers subcommittee. Out of this experience came a 1988 Georgetown Law Review article titled "The War Powers at a Constitutional Impasse: A 'Joint Decision' Solution," which later evolved into the 1995 Use of Force Act.⁶⁰⁶ The bill would have broadened the president's inherent authority to use force in many areas including to rescue American citizens, respond to foreign military threats which Congress will not have time to deliberate, and "forestall imminent acts of international terrorism."⁶⁰⁷ It also would establish a congressional leadership group similar to the composition of the Byrd-Warner PCG and regular reporting requirements.⁶⁰⁸ The bill retained the 60-day clock, but

⁶⁰⁴ "Section 2707. Repeal of the War Powers Resolution," *Congressional Record – House* (June 7, 1995), page 15209.

⁶⁰⁵ Gray, David and Louis Fisher, "The [WPR], Time to Say Goodbye," pages 15/16, and Fisher, Louis, *Presidential War Power, Third Edition, Revised*, page 151.

⁶⁰⁶ National War Powers Commission Report, Appendix 1, Miller Center of Public Affairs, page 24.

⁶⁰⁷ S. 564, 104th Congress, 1st Session, page 6.

⁶⁰⁸ S. 564, 104th Congress, 1st Session, pages 8-11.

allowed presidents to bypass it without authorization if they reported to Congress that an emergency existed which would threaten the nation.⁶⁰⁹ It also included a legislative veto, procedures for judicial review, and prohibition on the use of appropriated funds which it also tied to the 60-day clock.⁶¹⁰

As with all proposals, critics had much to say about the Use of Force Act. Louis Fisher warned that expanding the president's inherent authority to use force as the bill proposed would have made nearly every military action of the 1980s and 1990s, as well as the Korean War, exempt from congressional oversight. He additionally did not support removing the majority in Congress from presidential reporting and consultation.⁶¹¹ Another critic commented that presidents could use the emergency exemption to the 60-day clock as a loophole to avoid WPR regulation.⁶¹² Although Senator Biden reintroduced the bill in 1998, Congress never put the bill to a vote.⁶¹³

5. Baker-Christopher – National War Powers Commission – 2009

During 2007 and 2008, former Secretaries of State James Baker and Warren Christopher co-chaired the Miller Center's National War Powers Commission, whose goal was:

*"not to resolve constitutional conundrums that war powers questions present — only definitive judicial action or a constitutional amendment could do that. Instead, we chose to serve on the Commission to see if we could identify a practical solution to help future Executive and Legislative Branch leaders deal with the issue."*⁶¹⁴

⁶⁰⁹ S. 564, 104th Congress, 1st Session, page 13.

⁶¹⁰ S. 564, 104th Congress, 1st Session, pages 14-18.

⁶¹¹ Gray, David and Louis Fisher, "The [WPR], Time to Say Goodbye," page 15.

⁶¹² National War Powers Commission Report, Appendix 1, Miller Center of Public Affairs, pages 24-25.

⁶¹³ National War Powers Commission Report, Appendix 1, Miller Center of Public Affairs, page 24, and Fisher, Louis, *Presidential War Power, Third Edition, Revised*, page 152.

⁶¹⁴ National War Powers Commission Report, Miller Center of Public Affairs, page 3.

The commission's report is unique because it represented an attempt of two former secretaries of state from different parties and a panel of government and academic experts to create an effective replacement to the WPR, the War Powers Consultation Act of 2009.

The act would only require congressional authorization for "significant armed conflict" lasting over one week. Its definition of significant armed conflict explicitly did not include operations traditionally agreed to be within a president's authority: congressionally-authorized operations, repelling attacks, and rescuing U.S. citizens. However, the act went even further by explicitly excluding operations to "prevent imminent attacks" against the U.S., "limited acts of reprisal against terrorists or states that sponsor terrorism," and covert operations.⁶¹⁵ Once a president reported to Congress that he had initiated significant armed conflict, the act would require Congress to vote on a resolution approving the action within 30 days. If Congress voted down the operation, the act would require Congress to then pass a "joint resolution of disapproval," which would be subject to presidential signature. The act also laid out procedures and instances for presidential consultation with Congress. It would create a "Joint Congressional Consultation Committee," similar to the makeup of other proposed congressional consultation groups.⁶¹⁶

While the commission hoped its bill would create "practical ways to proceed in the future," it appears to have strongly favored strengthening the president's war powers.⁶¹⁷ The act would still give presidents a carte blanche to initiate hostilities – one week in this case. This is enough time to initiate a large military operation, such as Panama or Grenada, which may become politically unattractive for Congress to question

⁶¹⁵ National War Powers Commission Report, Miller Center of Public Affairs, page 36.

⁶¹⁶ National War Powers Commission Report, Miller Center of Public Affairs, pages 45-46.

⁶¹⁷ National War Powers Commission Report, Miller Center of Public Affairs, page 4.

once begun. The act's explicit exclusion of operations to "prevent imminent attacks," conduct "limited acts of reprisal against terrorists or states that sponsor terrorism," and conduct "covert operations" would create terminology ripe for exploitation by executive branch lawyers.⁶¹⁸ Future presidents would be able to cloak major offensive operations within these types of operations.

The most unusual part of the act was its requirement for Congress to vote down a military operation twice. If the president did not sign the joint resolution of disapproval, and Congress was unable to override the veto, the Commission recommended Congress rely on the power of the purse.⁶¹⁹ This is a risky proposition, because Congress is oftentimes is unwilling or politically unable to use the power of the purse on an ongoing military operation. At this point, the president would be clear of any further congressional interference. Additionally, the act made what at first glance appeared to be a directive requirement to the president to provide Congress with a classified report "before ordering or approving any significant armed conflict."⁶²⁰ However, the following section stated "if the need for secrecy or other emergent circumstances" prevented the president from reporting prior to hostilities, the president could submit a report within three days of significant armed conflict.⁶²¹ If the report to the joint congressional consultation committee was already classified, it is difficult to determine what circumstances would require further "need for secrecy" on the part of the president that would prohibit him from reporting prior to hostilities.

⁶¹⁸ National War Powers Commission Report, Miller Center of Public Affairs, page 36.

⁶¹⁹ National War Powers Commission Report, Miller Center of Public Affairs, page 9.

⁶²⁰ National War Powers Commission Report, Miller Center of Public Affairs, page 46.

⁶²¹ National War Powers Commission Report, Miller Center of Public Affairs, pages 46-47.

Louis Fisher harshly criticized the act for the double negative it placed on Congress to halt presidential wars. He stated Congress can deny presidential requests not only through negative votes, but also through inaction – “If the president submits a proposal to use military force in some other country and Congress ignores it ... Congress has decided ... As a separate branch, Congress has every right to decide which presidential proposals to vote on.”⁶²² He also disagreed with the act’s requirement that a president only need to consult with Congress prior to hostilities – “the Constitution is not designed to ensure that Congress will be ‘consulted’ before the president initiates war.”⁶²³

The War Powers Consultation Act of 2009 is notable for its purpose and commission members. However, it may have raised more constitutional questions than the current WPR as it would remove Congress from nearly all military decisions short of major war. The act would give presidents loopholes in which to cloak operations from congressional authorization. It also would provide them with a loophole with which to not notify Congress until after the commencement of hostilities. One of Louis Fisher’s concluding comments on the act is a fair representation of how many who look to curtail presidential war powers would view it – “the commission’s draft bill weakens Congress, plays to executive strengths, and undercuts the rule of law. It does great damage to the core structural safeguard of separation of powers and checks and balances.”⁶²⁴ The proposal would not fade away completely into obscurity as it would appear on Capitol Hill five years later.

⁶²² Fisher, Louis, “*The Law*. The Baker-Christopher War Powers Commission,” *Presidential Studies Quarterly*, 39 No. 1 (2009), page 136.

⁶²³ Fisher, Louis, “*The Law*. The Baker-Christopher War Powers Commission,” page 137.

⁶²⁴ Fisher, Louis, “*The Law*. The Baker-Christopher War Powers Commission,” page 139.

6. Kaine-McCain – War Powers Consultation Act of 2014 – 113th Congress

On January 16, 2014, Senators Tim Kaine and John McCain called for the repeal of the WPR and cosponsored the War Powers Consultation Act of 2014. Both Senators cited the bill's origin as the aforementioned War Powers Consultation Act of 2009.⁶²⁵ Senator Kaine stated as one of his reasons for introducing the bill that “forty years of a failed War Powers Resolution in today's dangerous world suggests that it is time now to get back in and to do some careful deliberation to update and normalize the appropriate level of consultation between a President and the legislature.”⁶²⁶ The bill had the same key features of the War Powers Consultation Act of 2009: 1. The one-week trigger for significant armed conflict; 2. The same exclusions from significant armed conflict; 3. The Joint Congressional Consultation Committee; and 4. The double negative vote in Congress to override a presidential military operation.⁶²⁷ Senator McCain stated he “[viewed] our introduction of this legislation today as the start of an important congressional and national debate.”⁶²⁸ However, the bill never went to a vote in either chamber and now likely will fade away into obscurity along with the other proposals to repeal or amend the WPR.

C. Conclusions on WPR Reform

The lack of success in any WPR reform over the past 40-plus years shows the complexity of the war powers issue. The two key issues of WPR reform have centered on the scope of the president's unilateral war powers and reporting/consultation

⁶²⁵ Introduction of S. 1939, 160 Cong Rec S 441, January 16, 2014, pages 441-443.

⁶²⁶ Introduction of S. 1939, 160 Cong Rec S 441, January 16, 2014, page 443.

⁶²⁷ S. 1939, 113th Congress, 2nd Session.

⁶²⁸ Introduction of S. 1939, 160 Cong Rec S 441, January 16, 2014, page 441.

requirements with Congress. Some critics fear an expansion of a president's unilateral war powers would have made many of the smaller conflicts in recent decades exempt from congressional oversight. The counter to this argument is presidents initiated these conflicts with minimal communication to and no consultation with Congress anyway. Therefore, if neither the presidents nor Congress will adhere to the requirements of the WPR, should this law remain on the books? However, as I stated in Chapter 2, there is evidence both branches have established boundaries and behaviors within the framework of the WPR, that while may not be overtly apparent, have given both branches flexibility in which to respond to crises, and most importantly, and helped avoid another presidentially-escalated war on the scale of Korea or Vietnam.

A major problem in WPR reform or repeal is neither branch wants to appear to concede war power authority. Presidents will veto any war powers legislation that they feel will weaken their inherent constitutional authority. On the other hand, a full repeal of the WPR would most certainly be seen as a congressional concession. Ironically, while there are numerous papers and studies making recommendations for reform, there is surprisingly next to nothing written about how to actually pass such an important and politically-divisive piece of legislation. The present WPR was born out of a unique moment in time – the Vietnam and Watergate eras. Only in a moment like this could Congress mobilize to build a veto-proof majority necessary to pass a law of this magnitude.

The only scholar that I found to point out this dilemma is Michael Glennon. He found the prospects for any WPR reform in 1990 to be “probably impossible in the

current political environment.”⁶²⁹ It is likely he would drop the “probably” from that statement if asked today. Barring another unique moment in time like we had in 1973, the WPR is likely to remain the law of the land for decades to come. As such, every president and Congress will need to continue to work within its guidelines, however blurry they become.

Part II – The WPR and Modern Warfare (e.g., Covert Operations, Cyber, Drones)

A major criticism of the WPR has been it does not apply to covert operations and other methods of modern warfare. As a result, many reform proposals have called to amend the WPR for these issues. The 1973 Congress decided to exclude covert operations from the WPR out of a desire to not require public disclosure of these operations and because Congress was still in the infant stages of evaluating legislative reform for covert operations.⁶³⁰ Critics regularly state the 1973 Congress developed the WPR envisioning large, conventional wars like in Vietnam, and could not foresee how technology and combat would evolve in the future.⁶³¹ The major problem of trying to apply the WPR to future wars is the Section 4(a) trigger, which states the deployment of U.S. forces into hostilities or situations expecting imminent hostilities triggers the 60-day clock. Many believe the WPR’s definition of U.S. forces specifically means members of the U.S. military, and therefore a drone or missile strike, cyber-attack, or operation by

⁶²⁹ Glennon, Michael J., *Constitutional Diplomacy*, page 113.

⁶³⁰ Damrosch, Lori F., “Covert Operations,” *The American Journal of International Law*, Vol. 83, No. 4 (1989), page 797, and Spong, Jr., William B., “The [WPR] Revisited: Historic Accomplishment or Surrender?” page 831.

⁶³¹ As an example, see Crook, John R., “The [WPR] – A Dim and Fading Legacy,” *Case Western Reserve Journal of International Law*, Vol. 45 (2012), pages 168-169.

personnel outside the Department of Defense would not trigger the WPR.⁶³² In this section, I will discuss how modern warfare fits into the war powers debate.

A. Covert Operations and War Powers

As I have discussed, many critics cite the exclusion of covert operations from the WPR as a significant deficiency. It is easy to infer from this criticism that if the WPR does not apply to covert operations, Congress must not have any checks against the president from conducting unrestrained covert operations. This is not true. Congress has different laws and a different level of oversight over covert operations and the intelligence community than it does over the military. In this section, I will discuss the growth of U.S. covert operations and the evolution of the laws by which both the president and Congress must abide.

The United States Code classifies the laws of the military and intelligence community under Titles 10 and 50, respectively. With the growth of special operations forces in both the military and intelligence communities over the past 35 years, lawyers have begun to refer to these operations as either “Title 10” or “Title 50” based on their organizational jurisdiction.⁶³³ The military’s Special Operations Command (SOC), emerged out of the failed Iranian hostage rescue mission in 1980. The fiasco made the military realize it needed to develop its own intelligence capability and joint command structure for covert operations.⁶³⁴ At this same time, the CIA began to expand its

⁶³² Chesney, Robert, “Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate,” *Journal of National Security Law and Policy*, Vol. 5:539 (2012), page 588.

⁶³³ Chesney, Robert, “Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate,” page 539.

⁶³⁴ Chesney, Robert, “Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate,” pages 545-549, 572.

capabilities to use lethal force, particularly in counterterrorism operations.⁶³⁵ As a result, both the military and intelligence community were developing their own in-house capabilities of their opposite, resulting in what is now called convergence.⁶³⁶

Convergence continued to grow in the post-9/11 era as President George W. Bush tasked both the military and CIA to capture or kill Osama Bin Laden and other Al Qaeda affiliates.⁶³⁷ As a result, the CIA became a full “combatant command,” particularly through the use of drones.⁶³⁸ While at the same time, the U.S. SOC became the military’s apparatus through which to conduct covert operations outside of conventional battle areas.⁶³⁹ Convergence is causing problems legally because the lines are blurring between “Title 10” and “Title 50” authority. While both the WPR and intelligence regulations are coded under Title 50 of the U.S. Code, conventional military operations are subject to the WPR, while covert and intelligence operations are subject to the intelligence regulations I will now discuss.

The key laws that form the backbone of covert operation oversight are the Hughes-Ryan Act of 1974, the Intelligence Oversight Act of 1980, and the Intelligence Authorization Act of 1991. The Hughes-Ryan Act of 1974 (Hughes-Ryan) placed funding restrictions and reporting requirements on the president for covert operations. The act prohibited the CIA from using funding for covert operations (i.e., not intelligence-gathering operations) unless the president reported “in a timely fashion” to

⁶³⁵ Chesney, Robert, “Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate,” pages 549-554.

⁶³⁶ Chesney, Robert, “Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate,” page 558.

⁶³⁷ Chesney, Robert, “Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate,” pages 554-578.

⁶³⁸ Chesney, Robert, “Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate,” pages 562-566.

⁶³⁹ Chesney, Robert, “Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate,” page 574.

Congress that the operation was important to national security.⁶⁴⁰ A key goal of the act was to prevent presidents from denying knowledge of covert operations in the future. President Reagan expanded the coverage of the act to apply to all agencies involved in covert activities.⁶⁴¹ Unfortunately and ironically, President Reagan's administration would bypass the requirements of this act during the Iran-Contra Affair by not reporting to Congress two of President Reagan's covert finding reports, thus hiding the scandal from congressional oversight.⁶⁴²

The Intelligence Oversight Act of 1980 codified two executive orders of Presidents Ford and Carter on congressional reporting requirements for intelligence activities.⁶⁴³ The act required agencies involved in current and significant anticipated intelligence activities to report them to the House and Senate Select Intelligence Committees.⁶⁴⁴ The act is significant because it expanded executive-branch reporting requirements to all intelligence activities, not just covert operations.

The final significant law for covert operation oversight is the Intelligence Authorization Act of 1991. The act repealed the Hughes-Ryan Act, only because it provided new requirements for presidential reporting of covert activities.⁶⁴⁵ Ironically, the law was the first to codify the definition of covert activities, which it defines as "an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States

⁶⁴⁰ P. L. 93-559, §32.

⁶⁴¹ Executive Order 12333--United States Intelligence Activities, Part 3.1 Congressional Oversight, National Archives, accessed March 22, 2015 at <http://www.archives.gov/federal-register/codification/executive-order/12333.html#3.1>.

⁶⁴² Steele, Douglas L., "Covert Action and the [WPR]: Preserving the Constitutional Balance," *Syracuse Law Review*, Vol. 39:1139 (1988), pages 1146-1147.

⁶⁴³ Chesney, Robert, "Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate," page 591.

⁶⁴⁴ S. 2284, 96th Congress, 2nd Session.

⁶⁴⁵ P.L. 102-88, §601.

Government will not be apparent or acknowledged publicly.”⁶⁴⁶ As with Hughes-Ryan, it requires the president to report all covert activity to the congressional intelligence committees and denies funding for operations that the president does not report. However, the 1991 act excludes from covert activities all activities that are considered traditional intelligence, counterintelligence, diplomatic, military, or law enforcement.⁶⁴⁷ As with all legal documents, an exclusion represents a potential loophole.

The 1991 act defines traditional military activities (TMA) as military-commanded operations where hostilities are ongoing or anticipated.⁶⁴⁸ Additionally, either the president or secretary of defense must approve the operation, again preventing future denial of knowledge. However, as Hughes-Ryan permitted only presidential approval, national security law professor Robert Chesney believes the new act is a “milder” reporting requirement as an appointed, not elected, individual (i.e., the secretary of defense) can shield covert military operations from congressional oversight.⁶⁴⁹ Chesney believes the problem of excluding TMA from the covert reporting requirement is it “also very likely shifts a substantial amount of high-risk unacknowledged activity beyond the reach of the decision making rules.”⁶⁵⁰ At this point, one would assume the TMA would then be subject to the requirements of the WPR. However, Chesney believes that due to the Obama Administration’s narrow definition of “hostilities” during the 2011 Libyan air campaign, “it is quite possible, if not probable, that a substantial amount of TMA would fall below the WPR threshold and hence generate no notifications to Congress.”⁶⁵¹

⁶⁴⁶ P.L. 102-88, §503(e).

⁶⁴⁷ P.L. 102-88, §503(e)(1)-(4).

⁶⁴⁸ Chesney, Robert, “Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate,” page 599.

⁶⁴⁹ Chesney, Robert, “Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate,” page 600.

⁶⁵⁰ Chesney, Robert, “Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate,” pages 601-602.

⁶⁵¹ Chesney, Robert, “Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate,” page 612.

The 1991 act created a loophole where covert military operations, classified as TMA, could easily fall through the cracks of both the intelligence and war powers oversight requirements. Furthermore, the 1991 act's definition of hostilities creates the same problems as in the WPR. Chesney fears the TMA definition is very vague as to what constitutes hostilities, who and what organizations compose the enemy, the geographic boundaries, and the duration of operations.⁶⁵² As a result, like the 2001 AUMF, TMA is subject to problems when fighting global terrorism, due to the organizational and geographic complexities of terrorist organizations. Chesney believes Congress should revisit what constitutes TMA outside of conventional battle areas.⁶⁵³

While the aforementioned laws frame Congress' current oversight over covert operations, there are some constitutional scholars that believe the Constitution gives Congress more inherent authority in the covert realm. Article I, Section 8 of the Constitution gives Congress its inherent powers to declare war and raise an army. However, it also empowers Congress to "grant letters of marque and reprisal, and make rules concerning captures on land and water."⁶⁵⁴ While many believe this to be an antiquated law granting Congress the power to authorize privateers to wage war on the open seas, some scholars believe it is still applicable in modern times.⁶⁵⁵

How is it possible to make the jump from eighteenth-century privateers to modern covert operations? One scholar has stated, "[Modern] covert war has the same distinguishing elements as the eighteenth century private warfare for which letters of marque and reprisal were required. The two forms of warfare use private individuals or

⁶⁵² Chesney, Robert, "Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate," pages 600-601, 614.

⁶⁵³ Chesney, Robert, "Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate," page 614.

⁶⁵⁴ Rossiter, Clinton, ed., *The Federalist Papers*, page 547.

⁶⁵⁵ Lobel, Jules, "Covert War and Congressional Authority: Hidden War and Forgotten Power," *University of Pennsylvania Law Review*, Vol. 134, No. 5 (June 1986), page 1037.

forces, rather than United States armed forces, to engage in hostile action in foreign nations, both are mainly relied upon in the absence of a declaration of war, and both threaten further United States involvement in full scale warfare.”⁶⁵⁶ As the WPR applies only to U.S. military personnel, the president can bypass it by using covert action by the CIA or other intelligence agencies, as well as activities conducted by contractors or proxy armies.⁶⁵⁷ However, as I stated above, the 1991 act’s definition of TMA now allows even U.S. military personnel conducting covert operations to be exempt from congressional oversight. This is what makes the case for the applicability of the marque and reprisal clause to modern warfare compelling and important.

Law professor Jules Lobel believes the Founding Fathers meant for the marque and reprisal clause to give Congress “power over all hostilities short of declared war.”⁶⁵⁸ He goes on to state that our current intelligence oversight laws, which give the president authority to “conduct covert operations without congressional approval,” are actually an “unconstitutional delegation of congressional power.”⁶⁵⁹ This is a powerful claim, and one which the Supreme Court’s 1800 ruling in *Bas v. Tingy* arguably supports (see Chapter 1). While evaluating the merit of this claim any further is outside the scope of this paper, it provides another example of the difficulties of interpreting constitutional authority in matters of war, this time with regards to covert operations.

Covert operations create a new legal complexity. Because covert participants can include military, non-military government, U.S. contractors, and even foreign proxy armies, the laws to regulate these operations fall across multiple jurisdictions. The

⁶⁵⁶ Steele, Douglas L., “Covert Action and the [WPR]: Preserving the Constitutional Balance,” page 1152.

⁶⁵⁷ Steele, Douglas L., “Covert Action and the [WPR]: Preserving the Constitutional Balance,” page 1154.

⁶⁵⁸ Lobel, Jules, “Covert War and Congressional Authority: Hidden War and Forgotten Power,” page 1058.

⁶⁵⁹ Lobel, Jules, “Covert War and Congressional Authority: Hidden War and Forgotten Power,” pages 1095-1096.

Intelligence Authorization Act of 1991 may further complicate matters as it has created a loophole through which U.S. military covert operations may not be subject to congressional oversight under either the WPR or current intelligence laws. The secrecy and deniability of covert operations put them at odds with democratic principles, particularly when there is minimal accountability and oversight.⁶⁶⁰ As covert operations continue to represent a larger part of U.S. military operations, it may be necessary for Congress to reassess the effectiveness of the current laws.

B. Advanced Weaponry and War Powers

There will always be controversy about the WPR's applicability to advanced weaponry as long as its trigger is tied to the introduction of U.S. military personnel into hostilities. While many criticize the 1973 Congress for not being able to envision weapons of the future, cruise missiles and intercontinental ballistic missiles were clear and present dangers in the 1970s. As I discussed Chapter 2, Louis Fisher made the claim that a nuclear strike would fail to trigger the WPR because of its short duration. While an extreme example, technically, Fisher is right.

President Clinton reported under the WPR cruise missile strikes in Iraq and Afghanistan/Sudan in 1993 and 1998, respectively.⁶⁶¹ In both cases, it is debatable whether President Clinton needed to report these airstrikes under the WPR; neither missile strike placed U.S. forces into hostilities and both were of a short duration. Furthermore, both strikes were in retaliation for aggressions against the U.S. (i.e., retaliation for the failed assassination attempt of President George H. W. Bush in 1993

⁶⁶⁰ Kibbe, Jennifer D., "The Rise of the Shadow Warriors," *Foreign Affairs*, March/April 2004, page 104.

⁶⁶¹ Grimmett, Richard F., "The War Powers Resolution: After Thirty-Six Years," *Congressional Research Service*, R41199 (2010), pages 53 and 58.

and for the U.S. Embassy bombings in 1998).⁶⁶² As a result, it is likely these strikes were within President Clinton's inherent rights as Commander in Chief to defend the nation and its interests.

The aforementioned missile strikes represent some historical precedent for reporting hostilities under the WPR (although probably unnecessary) related completely to the use of advanced weapons. Drones and cyberwarfare represent two of the latest evolutions in advanced warfare. Like missiles, these weapons do not place U.S. military personnel in imminent danger and can cause severe damage within short periods, likely exempting them from the WPR trigger. If the WPR does not apply, how do these new weapons fit within the war powers debate?

Any discussion about advanced weapons such as drones and cyberwarfare, which the U.S. would likely use both covertly and against either sovereign nations or non-state actors within them, must start with an analysis of the rights of states under international law. The U.N. Charter provides the modern international *jus ad bellum* (i.e., the right to war) requirements.⁶⁶³ Article 2(4) of the charter prohibits "the threat or use of force against the territorial integrity or political independence of any state," while Article 51 permits states the right of self-defense against armed attack.⁶⁶⁴ A strike by a drone, which is kinetic and causes physical destruction, would reach the level of violence to implicate the U.N. Charter. However, while cyberattacks can cause significant death and destruction, such as an attack on a nuclear power plant or air traffic control system, most focus on theft, espionage, or denial of service. While these non-kinetic attacks can be

⁶⁶² Grimmett, Richard F., "The War Powers Resolution: After Thirty-Six Years," pages 53 and 58.

⁶⁶³ *Jus Ad Bellum/Jus in Bello, Crimes of War*, accessed 3/24/2015, <http://www.crimesofwar.org/a-z-guide/jus-ad-bellum-jus-in-bello/>.

⁶⁶⁴ United Nations Charter, Chapters I and VII, United Nations, accessed 3/24/2015 at <http://www.un.org/en/documents/charter/index.shtml>.

devastating, they do not rise to the level of force the charter envisions.⁶⁶⁵ Evidence of this occurred in 2007 when a Russian cyberattack on government and banking systems in Estonia, a NATO member, did not trigger the collective self-defense action of the security organization.⁶⁶⁶

There is further debate as to whether “Title 10” versus “Title 50” operations by the U.S. would implicate the U.N. Charter’s measures for *jus ad bellum*. A “Title 50” drone or cyber operation would include a complete denial of involvement on the part of the U.S. Robert Chesney stated there is no evidence in the text or legislative history of Title 50 that Congress intended for operations under this section to violate the sovereignty of nations and international law. Therefore, while Congress may be aware of and support covert military operations, from a legal standpoint, “Title 50” operations may allow the U.S. more freedom to operate in states without providing notification to or receiving consent from the host government.⁶⁶⁷ As a result, Chesney stated many recent U.S. operations are considered hybrids where U.S. military assets operate under CIA command in order to retain “Title 50” designation.⁶⁶⁸

Drone warfare has emerged to become a major weapon in the U.S. arsenal. It played a major role in the 2011 Libyan air campaign, and continues to be a major factor in the War on Terror. As I discussed in Chapter 2 and earlier in this chapter, the Obama Administration has taken an aggressive position that drone operations do not constitute

⁶⁶⁵ Goldsmith, Jack, “How Cyber Changes the Laws of War,” *The European Journal of International Law*, Vol. 24, No. 1 (2013), pages 133-134, and Tullos, Kristen E., “From Cyber Attacks to Social Media Revolutions: Adapting Legal Frameworks to the Challenges and Opportunities of New Technology,” *Emory International Law Review*, Vol. 26 (2012), pages 738-739.

⁶⁶⁶ Tsagourias, Nicholas, “Cyber Attacks, Self-Defence and the Problem of Attribution,” *Journal of Conflict and Security Law*, Vol. 17, No. 2 (2012), page 232.

⁶⁶⁷ Chesney, Robert, “Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate,” pages 622-624.

⁶⁶⁸ Chesney, Robert, “Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate,” page 624.

hostilities due to their limited mission, risk, and exposure to U.S. military personnel.⁶⁶⁹

The Obama Administration is likely correct that an individual drone strike would not trigger the hostilities clause in the WPR, but it is impossible to deny they qualify as a kinetic use of force.

A major concern for the use of drones is the flexibility they provide to expand the battlefield out of the conventional battle areas. While the 2001 AUMF authorized the president to pursue those responsible for the September 11, 2001 terrorist attacks, drone warfare has aided both the Bush and Obama Administrations to pursue and attack terrorists and organizations whose ties to the September 11 attacks are marginal, at best. Furthermore, it may be too difficult and legally complex for Congress to reauthorize the 2001 AUMF for new variants of the original Al Qaeda organization. As a result, drones provide speed and flexibility in the warzone with which Congress is unable to keep pace.⁶⁷⁰

This poses an issue for modern *jus ad bellum* matters as well. Because the 2001 AUMF is the first time the U.S. declared hostilities against a non-state actor, it creates problems within current international law, which typically views states as aggressors. While there is a strong nexus between Afghanistan and the 2001 AUMF, the expansion of the War on Terror and specifically drone strikes into Pakistan and Yemen is less clear. Political scientist Michael Boyle believes the drone strikes in these countries are illegal

⁶⁶⁹ United States Senate. *Libya and War Powers*. S. HRG. 112-89, pages 22, 26-27.

⁶⁷⁰ Kreuzer, Michael P., "RPAs and Non-International Conflict – A Strategic/Legal Assessment," *Cardozo Law Review*, Vol 36:667 (2014), page 699.

under international law as “a state of war does not exist” between the U.S., Pakistan, and Yemen.⁶⁷¹

Cyberwarfare is a second, relatively new form of advanced warfare. A U.N. panel stated “the threat of a cyber-attack is ‘among the most serious challenges of the twenty-first century.’”⁶⁷² It is widely believed the U.S. was involved in the Stuxnet cyberattack on Iran’s nuclear program in 2010.⁶⁷³ In 2012, the National Defense Authorization Act authorized the president to “conduct offensive operations in cyberspace to defend our Nation, Allies and interests, subject to ... the War Powers Resolution.”⁶⁷⁴ Not only did Congress for the first time formally authorize the president to conduct offensive cyber operations, but it also placed them under the WPR’s purview.⁶⁷⁵

Like drone warfare, it is unlikely cyberwarfare could trigger the WPR due to its limited nature and insulation of U.S. personnel from hostilities. Therefore, Congress’ attempt to tie cyberwarfare to the WPR may not have any legal standing, regardless that the president signed it into law. Nevertheless, the threat cyberwarfare can pose to a nation, in both kinetic and non-kinetic forms, is very real. Scott Borg, a cyber-industry expert, believes a cyber-attack on critical infrastructure has “the potential to cause

⁶⁷¹ Kreuzer, Michael P., “RPAs and Non-International Conflict – A Strategic/Legal Assessment,” page 700. For more information about jus ad bellum requirements in international law, please see my section in Chapter 1 about declaring versus authorizing war.

⁶⁷² Roberts, Shaun, “Cyber Wars: Applying Conventional Laws of War to Cyber Warfare and Non-State Actors,” *Northern Kentucky Law Review*, Vol. 41:3 (2014), page 536.

⁶⁷³ Nakashima, Ellen and Joby Warrick. 2012. "Officials Say U.S., Israel were Behind Cyberattack on Iran." *The Washington Post*, Jun 02. <http://search.proquest.com/docview/1018119288?accountid=11752>.

⁶⁷⁴ H. R. 1540, §954, 112th Congress, 1st Session.

⁶⁷⁵ Tullos, Kristen E., “From Cyber Attacks to Social Media Revolutions: Adapting Legal Frameworks to the Challenges and Opportunities of New Technology,” page 741.

hundreds of billions of dollars' worth of damage and to cause thousands of deaths."⁶⁷⁶

The Department of Defense has also stated "some activities conducted in cyberspace could constitute a use of force, and may as well invoke a state's inherent right to lawful self-defense."⁶⁷⁷ If the potential damage from a cyberattack is this significant, the current legal arguments against naming cyberwarfare as a true destructive weapon may be masking its true potential.

During the 2011 Libya and War Powers Hearings, both State Department Legal Advisor Harold Koh and members of the Senate Committee on Foreign Relations stated the inadequacies of the WPR on the modern battlefield. Harold Koh stated, "At the time the law was passed, they were thinking about Vietnam. They weren't thinking about drones or cyber. So that would be one possibility to change the law to address realities of modern conflict."⁶⁷⁸ Committee Chairman Senator John Kerry further stated, "the [WPR] was not drafted with drones in mind. As our military technology becomes more and more advanced, it may well be that the language ... needs further clarification."⁶⁷⁹ However, as I have discussed in this chapter, the chances of amending the WPR to apply better to the modern battlefield may be remote; particularly if presidents continue to believe these weapons are essential to their protecting the nation as part of their inherent powers as Commander in Chief. In this case, future presidents will likely veto any bill Congress passes which constrains their ability to use these weapons unilaterally.

⁶⁷⁶ Caplan, Nathalie, "Cyber War: the Challenge to National Security," *Global Security Studies*, winter 2013, Volume 4, Issue 1, page 94.

⁶⁷⁷ Arnold, Allison, "Cyber 'Hostilities' and the [WPR], *Military Law Review*, Vol. 217 (2013), pages 179-180.

⁶⁷⁸ United States Senate. *Libya and War Powers*. S. HRG. 112-89, page 35.

⁶⁷⁹ United States Senate. *Libya and War Powers*. S. HRG. 112-89, page 2.

C. Conclusions on the WPR and Modern Warfare

Covert operations play an important role in national security. Proposals to amend the WPR for covert operations are unwise as they will make these matters public, which are best kept classified for national security purposes. Therefore, it is essential to ensure there are sufficient regulatory and oversight laws in place to give the public assurance that even classified operations are subject to appropriate congressional oversight. The current War on Terror exacerbates these challenges as the U.S. is fighting much of it using covert tactics. Therefore, it would be wise for Congress to reconsider whether it should revise the TMA exclusion in the Intelligence Authorization Act of 1991 to ensure no covert activities go unregulated. The marque and reprisal clause in the Constitution is another area in which Congress should evaluate its inherent rights to oversee covert operations.

Advanced weaponry pose a new challenge to appropriate authorization and oversight. Both drones and cyberwarfare limit risk to U.S. military personnel and extend the battlefields in ways that were unimaginable at the time the current war powers and intelligence laws were written. As a result, these weapons likely would not trigger the conventional war regulations of the WPR and also could be hidden as Title 50/TMA operations cloaking them from the intelligence oversight laws as well. As one scholar stated, advanced weapons remove “a legislative check on executive power, and when considered in light of historical views on the balance of power, [augment] executive power.”⁶⁸⁰

⁶⁸⁰ Chen, Julia L., “Restoring Constitutional Balance: Accommodating the Evaluation of War,” *Boston College Law Review*, Vol. 53:1767 (2012), page 1794.

Congress needs to reevaluate the effectiveness of its conventional and covert war powers laws as the TMA loophole and advanced weapons likely enhance executive power. One recommendation is to clarify whether the WPR trigger applies only to U.S. military personnel or any offensive use of force.⁶⁸¹ Unfortunately, any reform to the war powers laws would take massive political will, and therefore, is extremely unlikely in the current political era. If WPR reform is not possible, another option for Congress to maintain a legislative check would be to counter any presidentially-initiated operation using covert forces or advanced weapons through case law where the courts have sided with Congress against presidentially-initiated offensive military operations.

Part III – The Presidency and Congress – Contemporary Interpretations of War Powers

War powers are a huge element of U.S. foreign policy in 2015. The U.S. is continuing to battle Al Qaeda and its affiliates around the world and is contemplating how to eliminate the threat the Islamic State of Iraq and Syria (ISIS) poses to the Middle East. However, there is growing concern that the Obama Administration is battling terrorism under Authorizations for Use of Military Force (AUMF) which legally may no longer be applicable to the current phase of the War on Terror. President Obama has taken the unusual step of asking Congress for authorization to fight ISIS, while also stating he has the authority to do so under the current AUMFs. Meanwhile, Congress continues to show a lack of resolve to act as a unified body in both working with presidents and utilizing the WPR as it is written. I will discuss in this part the

⁶⁸¹ Bejesky, Rob, “Precedent Supporting the Constitutionality of Section 5(b) of the War Powers Resolution,” page 30.

contemporary issues related to the WPR from the perspectives of both the president and Congress.

A. The Presidency – The Growing Obsolescence of the 2001 and 2002 AUMFs and ISIS

Both Presidents Bush and Obama have used their authorization under the 2001 and 2002 AUMFs to wage the War on Terror. As discussed in Chapter 2, the 2001 AUMF authorized the president to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”⁶⁸² The 2002 AUMF authorized the president to “defend the national security of the United States against the continuing threat posed by Iraq” as well as enforce U.N. Security Council resolutions and continue to battle terrorist organizations responsible for the September 11, 2001 attacks.⁶⁸³ However, over thirteen years after the September 11 terrorist attacks and eleven after the capture of Saddam Hussein, the U.S. has eliminated most of the key targets for which Congress approved the original AUMFs. Nevertheless, the U.S. is continuing to strike Al Qaeda-affiliated groups around the world and is expanding its role in combatting ISIS. There is a growing debate as to whether the 2001 and 2002 AUMFs are obsolete as authorization for the current phase of the War on Terror.

Congress authorized both the 2001 and 2002 AUMFs under the WPR. However, unlike in Lebanon where Congress placed an 18-month time limit on President Reagan’s authorization, it placed no time limits in either AUMF. Senators John McCain and John

⁶⁸² Public Law 107-40, 107th Congress, 1st Session.

⁶⁸³ Public Law 107-243, 107th Congress, 2nd Session.

Kerry had argued tying the 2001 AUMF to the September 11 terrorist attacks limited the authorization. However, Harold Koh has stated the 2001 AUMF does the opposite by allowing presidents to cite it as authorization as long as they can tie the adversary to Al Qaeda.⁶⁸⁴ In a 2013 congressional hearing, senior Department of Defense official Michael Sheehan stated the U.S. would be fighting Al Qaeda and its affiliates for “at least 10 to 20 years.”⁶⁸⁵ Mr. Sheehan further stated the administration was “comfortable with the AUMF as it is currently structured.”⁶⁸⁶

The 2001 and 2002 AUMFs are not the first instances of open-ended war authorizations. Neither the Gulf of Tonkin Resolution nor the 1991 AUMF against Iraq had fixed durations. Presidents Johnson and Nixon used the former as authorization to build up and continue the Vietnam War for seven years (until Congress repealed it) and Presidents George H. W. Bush, Clinton, and George W. Bush used the latter to conduct air strikes and no-fly zones over Iraq up to the 2003 U.S. invasion.⁶⁸⁷ The problem is any time Congress declares or authorizes war, it is difficult to take that power back from the president – “once the President receives the authorization to wage war, the President is for all intents and purposes, transformed into a king.”⁶⁸⁸ In the cases of both the 2001 and 2002 AUMF, Congress authorized the president to use “necessary and appropriate” force, which is the “maximum discretion” Congress can authorize to the president.⁶⁸⁹

⁶⁸⁴ Kibbe, Jennifer D., “The Rise of the Shadow Warriors,” page 108.

⁶⁸⁵ No end to drone strikes for 20 years: Pentagon. (2013, May 18). *The Nation*, retrieved from <http://search.proquest.com/docview/1352839605?accountid=11752>.

⁶⁸⁶ No end to drone strikes for 20 years: Pentagon. (2013, May 18). *The Nation*.

⁶⁸⁷ Public Law 88-408, Public Law 91-672, and Grimm, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” pages 24-26.

⁶⁸⁸ Weiner, Michael B., “The War Powers Gamble,” accessed February 15, 2015 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1051181, page 2.

⁶⁸⁹ Public Law 107-40, Public Law 107-243, and Weiner, Michael B., “A Paper Tiger with Bite: A Defense of the [WPR],” *Vanderbilt Journal of Transnational Law*, Vol. 40: 861 (2007), page 896.

Due to Congress' wording of the 2001 and 2002 AUMFs, Presidents Bush and Obama have had near unlimited authority in conducting the War on Terror. The war has expanded beyond the original battlefields of the AUMFs: Afghanistan and Iraq. The U.S. is conducting strikes around the world, but particularly in Pakistan and Yemen (under authorization from the 2001 AUMF), regardless of the tenuous connection of the targets to the September 11 terrorist attacks. Former Attorney General Michael Mukasey (under President George W. Bush) stated the Pakistani Taliban, "are arguably not within [the 2001 AUMF's] reach."⁶⁹⁰ Furthermore, the U.S.' main target in Yemen, Al Qaeda in the Arabian Peninsula, formed after the September 11 terrorist attacks and has an "indirect at best" connection to Al Qaeda proper.⁶⁹¹ One scholar fears the U.S.' continued use of the 2001 AUMF will not only discredit it internationally, but also encourage other nations to adopt the same legal interpretation in future conflicts.⁶⁹²

As I discussed in Chapter 2, President Obama went to Congress in 2013 to request authorization to intervene in the Syrian civil war. This was an unusual shift of positions for the president, who in 2011 unilaterally involved the U.S. in the NATO-led intervention in the Libyan civil war. In Libya, President Obama cited his authority to intervene pursuant to a U.N. Security Council Resolution and his inherent authority as Commander in Chief. However, in Syria just two-years later, he did not assert his executive authority and instead asked Congress to give him authorization. I believe he

⁶⁹⁰ May 20, 2011 letter from Michael B. Mukasey, to Congressman Howard P. "Buck" McKeon, as cited in Barnes, Beau D., Reauthorizing the 'War on Terror': The Legal and Policy Implications of the AUMF's Coming Obsolescence," *Military Law Review*, Vol. 211 (2012), page 84.

⁶⁹¹ Barnes, Beau D., Reauthorizing the 'War on Terror': The Legal and Policy Implications of the AUMF's Coming Obsolescence," *Military Law Review*, Vol. 211 (2012), page 84.

⁶⁹² Barnes, Beau D., Reauthorizing the 'War on Terror': The Legal and Policy Implications of the AUMF's Coming Obsolescence," pages 96-97.

did this due to the differences in political risk and popularity of intervention in Syria versus Libya.⁶⁹³

In February 2015, President Obama again went to Congress to obtain authorization to intervene in Syria and Iraq, this time against ISIS.⁶⁹⁴ ISIS has become a threat to regional stability after emerging out of the 2011 U.S. withdrawal of Iraq and the Syrian civil war. The organization has captured territory across both Syria and Iraq, and is trying to create a caliphate based on extremely-conservative interpretations of Islam. ISIS has been behind terrible atrocities in the areas it controls, including the murder of U.S. citizens.⁶⁹⁵

As with President Obama's 2013 appeal to Congress for authorization to intervene in Syria, his 2015 request for authorization to intervene against ISIS has created an interesting debate about the inherent powers of the president and Congress in war matters. Some feel President Obama's request to Congress was a concession of presidential power – "There is a deep concern in the Executive Branch that any concession to Congress on war powers will create a precedent that could erode presidential powers."⁶⁹⁶ Others like Louis Fisher believe the Constitution gives Congress the sole authority to initiate war on any scale.⁶⁹⁷ Even more interesting were President Obama's mixed signals in his request to Congress – "Although existing statutes provide me with the authority I need to take these actions, I have repeatedly expressed my

⁶⁹³ Please read my section on Syria – 2013 in Chapter 2 for a more in-depth discussion.

⁶⁹⁴ Blanchard, Christopher M. et al., "The 'Islamic State' Crisis and U.S. Policy," *Congressional Research Service*, R43612 (2015), page 26.

⁶⁹⁵ Blanchard, Christopher M. et al., "The 'Islamic State' Crisis and U.S. Policy," Summary, page 1.

⁶⁹⁶ Atwood, J. Brian, "The [WPR] in the Age of Terrorism," *Saint Louis University Law Journal*, Vol. 52:57 (2007), page 64.

⁶⁹⁷ Gray, David and Louis Fisher, "The [WPR], Time to Say Goodbye," page 8, and Fisher, Louis, "*The Law*," pages 180, 182, and Fisher, Louis, "War Powers for the 21st Century: The Constitutional Perspective," pages 2-3.

commitment to working with the Congress to pass a bipartisan authorization for the use of military force (AUMF) against [ISIS].”⁶⁹⁸ Therefore, what are President Obama’s motives for yet again going to Congress?

As with Syria, I believe the Obama Administration has determined the political risks too high to intervene without Congress’ authorization. But, I believe there is more to the president’s motives than this. President Obama is a constitutional scholar, and understands how the Constitution expects the branches to interact. The Obama Administration is also the first administration since the passing of the WPR in 1973 to not question the constitutionality of the law, which is a huge departure from previous administrations, and a concession of presidential power in itself.⁶⁹⁹ As a result, while the president has told Congress he has the authority to intervene against ISIS without Congress, I believe he is a constitutional idealist who wants to see the Constitution function as the Founding Fathers intended. There are other benefits as well. A unified executive and legislature strengthens U.S. credibility abroad, which in this case is particularly important as the president struggles to build a coalition to directly confront ISIS.⁷⁰⁰ All of these factors have contributed into the president’s decision to go to Congress for authorization.

The president’s AUMF proposal attempts to address some of the concerns about the growing obsolescence of the 2001 and 2002 AUMF. The president’s proposal would

⁶⁹⁸ “Letter from the President -- Authorization for the Use of United States Armed Forces in connection with the Islamic State of Iraq and the Levant,” The White House, February 11, 2015, accessed March 28, 2015 at <https://www.whitehouse.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection>.

⁶⁹⁹ United States Senate. *Libya and War Powers*. S. HRG. 112-89, page 22.

⁷⁰⁰ Auerswald, David P. and Peter F. Cowhey. “Ballotbox Diplomacy: The [WPR] and the Use of Force,” page 507.

repeal the 2002 AUMF for Iraq, replacing it with the authorization in the new AUMF.⁷⁰¹ It would terminate in three years, addressing a major criticism of the open-ended 2001 and 2002 AUMFs, and cites congressional authorization in accordance with Sections 5(b) and 8(a)(1) of the WPR (as all modern authorizations have done).⁷⁰² The proposal also states it “does not authorize the use of the United States Armed Forces in enduring offensive ground combat operations,” which critics believe creates a loophole for the use of ground forces in operations of shorter durations.⁷⁰³ While the proposed AUMF does not address the 2001 AUMF, President Obama stated in his proposal to Congress he remains “committed to working with the Congress and the American people to refine, and ultimately repeal, the 2001 AUMF,” and believes his new proposal could “serve as a model for how we can work together to tailor the authorities granted by the 2001 AUMF.”⁷⁰⁴

President Obama’s AUMF proposal has received mostly negative criticism in the weeks following its release. An editorial in the Wall Street Journal considered the proposal “political cover for his military strategy,” while the New York Times stated it “turns presidential history on its head. Presidents typically resist congressional encroachment and assert the broadest possible interpretation of their ability to order the military into combat.”⁷⁰⁵ Republican Congressman Mac Thornberry stated President

⁷⁰¹ “Draft Joint Resolution,” The White House, February 11, 2015, accessed March 28, 2015 at https://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf.

⁷⁰² “Draft Joint Resolution,” The White House, February 11, 2015.

⁷⁰³ “Draft Joint Resolution,” The White House, and Baker, Peter, “Obama’s Dual View of War Power Seeks Limits and Leeway,” *The New York Times*, February 11, 2015, accessed March 28, 2015 at http://www.nytimes.com/2015/02/12/us/obama-war-authorization-congress.html?_r=0.

⁷⁰⁴ “Letter from the President -- Authorization for the Use of United States Armed Forces in connection with the Islamic State of Iraq and the Levant,” The White House.

⁷⁰⁵ “The War Irresolution,” *The Wall Street Journal*, Feb 12, 2015, accessed March 28, 2015 at <http://search.proquest.com/docview/1654552424?accountid=11752>, and Baker, Peter, “Obama’s Dual View of War Power Seeks Limits and Leeway.”

Obama “should explain why he is seeking to tie his own hands by limiting authority that he's already claimed,” while Democratic Congressman Adam Schiff said, “It’s I think quite carte blanche in terms of geography, types of forces, etc. And therefore, I think we’re going to have to have a lot of work on that.”⁷⁰⁶ Congress has yet to take any action on the president’s proposal. If Congress does not ultimately take any action, President Obama has made it clear he believes he already has authority to act on his own. The WPR debate continues...

B. The Congress – An Effective Check on Presidential War Power?

“We are making ourselves irrelevant.”⁷⁰⁷ Senator Bob Corker said this about Congress’ role in war powers during the 2011 Libya and War Powers Senate Hearing. Senator Corker is not alone as many critics also feel Congress has acquiesced too much war power authority to the president – “Congress has thus far failed to play its role as a brake as the founders envisioned.”⁷⁰⁸ One theory for this problem is while the Constitution gives Congress the power to initiate war, it does not give it the power to end war.⁷⁰⁹ As a result, Congress hands the president most of its leverage with a declaration or authorization.

While many have argued Congress’ most powerful weapon is still the power of the purse, as it can terminate funding on a presidential military operation at any time, this

⁷⁰⁶ Lee, Carol E. and Michael R. Crittenden, "Debate Opens on New War Powers --- President Asks Congress to Back Islamic State Fight," *The Wall Street Journal*, Feb 12, 2015, accessed March 28, 2015 at <http://search.proquest.com/docview/1654553000?accountid=11752>, and Baker, Peter, “Obama’s Dual View of War Power Seeks Limits and Leeway.”

⁷⁰⁷ United States Senate. *Libya and War Powers*. S. HRG. 112-89, page 23.

⁷⁰⁸ Atwood, J. Brian, “The [WPR] in the Age of Terrorism,” page 72.

⁷⁰⁹ Patera, John, “War Powers Resolution in the Age of Drone Warfare: How Drone Technology has Dramatically Reduced the Resolution's Effectiveness as a Curb on Executive Power,” *Journal of Public Law and Policy*, Vol 33:2 (2012), page 395.

is not a realistic option as the president still maintains sole authority to withdraw U.S. forces. More importantly, no Congress would morally or politically allow U.S. forces to be unsupported once in theater.⁷¹⁰ As a result, Congress' best chance to remain a check against the executive branch in war matters is to restrict the president's authority in the AUMF, something on which Congress has a mixed track record.⁷¹¹ Scholars have raised the idea that the nation is more at risk in how Congress authorizes (or "abdicates") power to the president in war matters than from a "unilateral use of force."⁷¹²

Michael Glennon believes the WPR has been a failure for Congress. In his opinion, the 1973 Congress made three miscalculations: 1) how Congress would need to enforce the WPR against the president; 2) Congress' ability or desire to play its role in the WPR; and 3) that the Supreme Court would strike down the legislative veto, a key element of the WPR.⁷¹³ Political scientists Timothy Boylan and Glenn Phelps believe Congress uses the WPR as "a shield against the need to take action."⁷¹⁴ However, not everyone is completely down on the WPR. Some argue the WPR can be effective, but only if Congress asserts itself. If Congress doesn't, "the President will fill the vacuum, and the WPR will be destined for impotence."⁷¹⁵

Although the WPR is a flawed document and the members of Congress deserve some criticism for the expansion of presidential war power in the post-WWII era, the

⁷¹⁰ Weiner, Michael B., "The War Powers Gamble," page 5, and Patera, John, "War Powers Resolution in the Age of Drone Warfare," page 395.

⁷¹¹ One can argue Congress successfully placed limits on the president's authority in Lebanon, the 1991 Persian Gulf War, Somalia, and Bosnia while it was less successful in the 2001 and 2002 AUMFs, and the 2011 Libyan air campaign. See Chapter 2 for a discussion of these cases.

⁷¹² Weiner, Michael B., "The War Powers Gamble," page 14 and Weiner, Michael B., "A Paper Tiger with Bite: A Defense of the [WPR]," pages 893-894.

⁷¹³ Glennon, Michael J., *Constitutional Diplomacy*, pages 102-103.

⁷¹⁴ Boylan, Timothy S. and Glenn A. Phelps. "The War Powers Resolution: A Rationale for Congressional Inaction," page 122.

⁷¹⁵ Wald, Martin, "The Future of the War Powers Resolution," page 1445.

institution and design of Congress itself is also to blame. Congress has a “collective action problem” in foreign affairs.⁷¹⁶ While the press will focus pressure and attention solely on the president in a foreign affairs crisis, it will hardly ever focus pressure or attention on any single member of Congress. Furthermore, any accolades Congress may receive in foreign affairs will be shared across the institution versus with a single member.⁷¹⁷ Due to the lack of incentives for congressmen to involve themselves in foreign affairs and military conflicts, law professor Neal Devins stated, “Rather than oppose the President on a potential military action, most members of Congress find it more convenient to acquiesce and avoid criticism that they obstructed a necessary military operation.”⁷¹⁸ As a result, the institution and design of Congress encourages members to focus on domestic policy issues and the interests of their constituents.⁷¹⁹

Partisanship is another factor scholars consider in evaluating the behaviors of congressmen in foreign affairs and military actions. As can be expected, political scientists Jon Pevehouse and William Howell found a positive correlation between a president’s use of force and party control in Congress.⁷²⁰ Neil Devins stated congressional oversight is also positively correlated to political polarization. In his view, “when the President and Congress are from the same party, the majority in Congress will not use oversight to hold the President to task. And when the government is divided, Congress will make oversight a top priority.”⁷²¹ This is troubling because it shows a

⁷¹⁶ Hanania, Richard, “Humanitarian Intervention and the War Powers Debate,” *The Journal Jurisprudence*, Volume 13 (2012), page 90.

⁷¹⁷ Hanania, Richard, “Humanitarian Intervention and the War Powers Debate,” page 86.

⁷¹⁸ Devins, Neil, “Presidential Unilateralism and Political Polarization: Why Today’s Congress Lacks the Will and the Way to Stop Presidential Initiatives,” *Willamette Law Review*, Vol 45:395 (2009), page 400.

⁷¹⁹ Hanania, Richard, “Humanitarian Intervention and the War Powers Debate,” page 91.

⁷²⁰ Howell, William G., and Jon C. Pevehouse, “Presidents, Congress, and the Use of Force,” *International Organization*, Vol. 59, winter (2005), page 228.

⁷²¹ Devins, Neil, “Presidential Unilateralism and Political Polarization,” pages 409-410.

breakdown in the separation of powers, with Congress becoming more parliamentary in its interactions with the president.

Political scientists Bryan Marshall and Brandon Prins expanded on the Pevehouse/Howell study and found a more accurate indicator of presidential use of force abroad is the president's ability to pass policy through Congress versus party cover. They did not find the correlation between partisanship and presidential military action that Pevehouse and Howell found, but instead concluded presidents are less likely to pursue military adventures abroad if they are successful in passing their domestic policy agenda in Congress.⁷²² Their findings support unilateral presidential uses of force, as they claim the president is more likely to pursue unilateral military action if Congress is obstructing him. What we can take from these studies is presidents have incentives to use force when their party backs them in Congress, and also when their influence in Congress is waning, which in itself is concerning and reason to have strong checks in place to counter presidential authority.

Interestingly, there has been other research that shows different presidential behaviors based on party control in the two chambers. Jong Hee Park's research found presidential unilateral uses of force rise with party control in the Senate, but drop with party control in the House.⁷²³ Park believes a major factor for this is the electorates tie the Senate to national issues and the president's performance versus the members of the House, who are better able to "[distance] themselves from unfavorable national

⁷²² Marshall, Bryan W., "Power or Posturing? Policy Availability and Congressional Influence on U.S. Presidential Decisions to Use Force," *Presidential Studies Quarterly*, Vol. 41, No. 3 (September 2011), page 523.

⁷²³ Park, Jong Hee, "Structural Change in U.S. Presidents' Use of Force," *American Journal of Political Science*, Vol. 54, No. 3, July 2010, page 773.

conditions.”⁷²⁴ Poor domestic conditions are another factor researchers have found for presidents to undertake military action overseas – “By sending troops abroad, it is supposed, presidents can shift public attention away from a failing economy and rally widespread support, as members of Congress automatically fall behind their chief executive.”⁷²⁵ A recent example of this is Vladimir Putin’s invasion of Ukraine, which many believe was an effort to artificially boost patriotism at home and shift public attention away from Russia’s poor economic conditions.

Regardless of party affiliation and national conditions, the Founding Fathers designed the Constitution for Congress to act as a check on the president in war matters – “when Presidents act, it is up to the other branches to respond. In other words, Presidents often win by default – either because Congress chooses not to respond or because its response is ineffective.”⁷²⁶ Pevehouse and Howell stated an effective Congress can “increase the marginal costs” of the president pursuing “risky foreign conflicts.”⁷²⁷ Congress passed the WPR to aid future Congresses in this very task. However, the WPR still requires Congress to act, something it has been hesitant, or unable as a body, to do for much of the law’s existence. As Congressman Lee Hamilton stated in defense of the WPR during the 1995 attempt to repeal it, “The Congress can stand against a president. The Congress can stand beside a president. What Congress must not do is to stand aside. Congress should not cede its constitutional responsibilities. We are a co-equal branch of government.”⁷²⁸

⁷²⁴ Park, Jong Hee, “Structural Change in U.S. Presidents’ Use of Force,” pages 776-777.

⁷²⁵ Howell, William G., and Jon C. Pevehouse, “Presidents, Congress, and the Use of Force,” page 212.

⁷²⁶ Devins, Neil, “Presidential Unilateralism and Political Polarization,” page 399.

⁷²⁷ Howell, William G., and Jon C. Pevehouse, “Presidents, Congress, and the Use of Force,” page 210.

⁷²⁸ “Section 2707. Repeal of the War Powers Resolution,” *Congressional Record – House* (June 7, 1995), page 15201.

Part IV – Chapter 3 Conclusions

Nothing is simple with regards to the WPR. It emerged out of a unique moment in America's history, so unique that political complexities have made it impossible for either branch or political party to pass any reform. The evolving nature of warfare is also showing weaknesses in the wording of the WPR. A large loophole has developed between the WPR and intelligence laws, where many operations may go unreported, and many modern weapons may be exempt from the law as they do not place U.S. military forces in harm's way. Regardless of these problems, it is very unlikely that any war powers reforms will take place in the near future due to the political stakes involved for both branches. It may be worthwhile to pursue closing the TMA loophole through new intelligence legislation, which does not pose as much of a threat to the inherent powers of both branches as a change in war powers authority would. Most likely, the WPR is here to stay, and both branches will need to continue determine how best to work within its framework.

The contemporary war power interpretations of both branches are another major issue. President Obama has recently shown more effort to work with Congress in war matters. However, it is unknown whether this will bear any fruit for him or whether the next president will pursue the same course. The bigger issue is with Congress. Unfortunately, political polarization and the structure of the institution itself provide little incentives for the branch to assert itself in foreign affairs. The WPR can still work to provide a useful framework through which future presidents and Congresses can interact to shape future war policies. Presidents will always exercise what they feel is their inherent right to lead the nation's military into battle. It is up to Congress to find within

itself the ability to ensure it becomes the check against presidential war which the Founding Fathers intended.

Conclusion

The vague war powers text within the Constitution made the controversies over the WPR inevitable. The Founding Fathers split the war powers between the president and Congress to prevent the rise of a tyrant. The principle of separation of powers expects when one branch asserts itself, the others will respond and counter. That principle played out when the 1973 Congress passed the WPR in response to the unchecked growth of presidential war power in the post-WWII era. Since 1973, history has shown presidents continue maintain an aggressive position on inherent war authority while the post-1973 Congresses have not been able to match the unity and enthusiasm which enabled it to pass the WPR. Furthermore, the courts have made it clear they will not intervene in war matters until the two branches reach a constitutional impasse. Therefore, Congress is on its own to mobilize when it feels the president has exceeded his inherent authority.

As I stated in my introduction, I agree with those who claim the WPR, while an imperfect document, is constitutional, has made a difference, and helped to curtail unilateral presidential war. The WPR has flaws; some of its sections are contradictory, presidents can bypass its key trigger, and critics consider many of its sections unconstitutional. However, the language in the WPR is consistent with the Constitution and judicial history. The WPR's framework ensures Congress is always in control of overall authorizations for offensive war, whether through an outright authorization or the WPR's de facto 60-day authorization (which Congress can terminate at any time through a vote). It also acknowledges the president has constitutional authority as Commander in Chief in operations of a defensive or protective nature. The WPR can ensure both

branches fulfill their constitutional duties before taking the country to war, but only if both branches are willing to abide by it.

The WPR has changed the behaviors of presidents and Congress. Most importantly, there has not been another Vietnam, which was the goal of its drafters. Presidents have had opportunities to escalate conflicts like as what happened in Vietnam, such as in Lebanon, the 1991 Persian Gulf War, Somalia, Yugoslavia, and Libya, but they didn't. What has evolved in the 40-plus years of the WPR is a framework where Congress is deferring to presidents in small-scale operations, but involving itself in decisions to engage in major wars, such as the 1991 Persian Gulf War and the wars in Iraq and Afghanistan. Congress to date has supported the president in the significant non-major operations, such as the invasions of Panama and Grenada. However, this may not always be the case, and a time may come when a president unilaterally invades a small nation and Congress does not approve. We will have to cross that bridge as a nation when it comes.

What is less certain is the future effectiveness of the WPR. The evolving nature of warfare is showing weaknesses in the wording of the WPR. A large loophole has developed between the WPR and intelligence laws, where many operations may go unreported. Many modern weapons may be exempt from the law as they do not place U.S. military forces in harm's way. However, due to the political stakes involved for both the executive and legislative branches, coupled with the highly-partisan environment in Congress, it is unlikely any reform will be possible in the near future. Therefore, both branches will need to continue determine how best to work within the WPR's current framework.

While neither branch may be following the WPR to the letter, both branches have established boundaries through their historical actions. Presidents will always exercise what they feel is their inherent right to lead the nation's military into battle. Congress' challenge is political polarization and the structure of the institution itself provide little incentives for the branch to assert itself in foreign affairs. An impotent Congress cannot be the check which the Founding Fathers intended against presidential war. Nevertheless, while the results of congressional applications of the WPR have been mixed, the WPR restored modern Congresses with a confidence that earlier ones had lost in asserting themselves against the executive branch.

Ironically, the very vagueness of the WPR which brings much of its criticism is also its greatest strength. Neither the president, nor Congress, know what parts of the WPR, if any, are actually unconstitutional. They also do not know the true consequences of actually disregarding it outright. This is because no lawsuit Congress has brought to the courts has had standing. We know it is likely the Section 5(c) legislative veto is unconstitutional, but we also know the courts expect a true constitutional impasse before hearing a case, meaning Congress must essentially pass a legislative veto before having standing. We also know the *Campbell v. Clinton* ruling may have invalidated the 60-day automatic withdrawal provision (unless Congress were to pass a negative resolution), but we also know presidents continue to report military operations "consistent with the WPR" and Congress still uses the 60-day limit as a marker like it did with President Obama in Libya. Therefore, the strength of the WPR lies in its ambiguity – "while its

requirements are clear black-letter law, its enforcement structure owes its strength to behavioral norms rather than law.”⁷²⁹

A major issue for Congress is properly scoping authorizations. Congress has done this before in placing a time limit on operations in Lebanon and prohibiting President Bush from regime change in Iraq in 1991, but hindsight is questioning whether Congress should have placed time and scope limitations in the 2001 and 2002 AUMFs. There have been other instances in which the Senate and House could not agree on the scope of the authorizations, such as in Yugoslavia and Libya. In these cases, Congress sent mixed signals by not passing an authorization while still appropriating funds for combat operations. However, in both of these cases, Congress and the president limited the scope of the operations to air campaigns only. Congress made it clear it did not want boots on the ground in either of these operations, and Presidents Clinton and Obama did not pursue escalation to this level. In this case, Congress’ lack of consensus for a ground war or other options was its de facto authorization for the air campaign.

A bigger issue in the war powers debates is the defining of hostilities, particularly with small-scale operations, or operations involving advanced weapons. The executive branch has taken the position WPR-level hostilities must include a significant duration, place U.S. personnel at risk, have a risk of escalation, and have the regular use of kinetic weapons. This definition would exclude covert operations, individual missile or drone strikes, and cyber-attacks. Building on this matter is the covert TMA loophole, which has the potential to exclude military covert operations from any congressional oversight. Future presidents and Congresses will need to establish boundaries for these types of

⁷²⁹ Weiner, Michael B., “A Paper Tiger with Bite: A Defense of the [WPR],” page 872.

operations as they are likely to become increasingly significant components of modern warfare.

There are several areas which I believe require further research. The first is the applicability of our current laws to covert operations and modern weapons. As I discussed in the previous paragraph, these types of operations can easily fall outside of the WPR and intelligence laws currently in place. There is significant risk that a military operation that the CIA commands would qualify as TMA and fall through the cracks of current congressional oversight. Should future presidents be able to authorize Osama Bin Laden-type raids against future targets (not covered under a current AUMF) without notifying Congress? Raids of this magnitude can have significant foreign policy implications for a nation, particularly if something were to go wrong (which almost happened in the Bin Laden raid). Should Congress have a role in authorizing them?

A second, related area is drone strikes. Most scholars already believe drone strikes do not fall under the purview of the WPR. Yet, they can cause massive kinetic damage, and like a special forces raid, can have significant political consequences for a nation. Should the WPR be amended to include drone strikes and other forms of advanced warfare? There are also other considerations such as assassinations of U.S. citizens abroad, as with the 2011 drone strike which killed terrorist and U.S. citizen Anwar al-Awlaki in Yemen. President Obama had authority for this mission under the 2001 AUMF. However, al-Awlaki's killing raised constitutional and international law questions. Further research should be done to look at whether U.S. law should change to incorporate drone strikes in the WPR, as well as the legality of targeted killings abroad, particularly of U.S. citizens.

A third area deals with the growth of the CIA as a combatant command and the use of contractors in military operations. The WPR only applies to the introduction of U.S. military personnel into hostilities, it therefore excludes CIA personnel, contractors, and foreign personnel acting on behalf of the U.S. Further research should be done to analyze whether Congress should have more authority over approving non-military combat operations. Additionally, how do private contractors fall under U.S. law and should any changes be made when they are working in hostile environments as agents of the U.S.?

Finally, more research should be done into the separation of powers issues surrounding war powers. Would Congress need a veto-proof majority in both chambers to reach a constitutional impasse, or is a simple majority sufficient? Additionally, how would a constitutional impasse be decided by the courts, particularly in a war powers context? Further research could be done into evaluating how the WPR or even the constitution should be amended to clarify war powers between the branches.

One issue for consideration would be should Congress be allowed not only to declare war, but also end war? Allowing Congress the power to end war may give it leverage which would return some of the balance which has been lost in the post-WWII era. A second issue is should presidents be legally allowed to initiate limited offensive combat operations? This could potentially lead to presidential abuse, but would also provide the president with flexibility to respond to threats in the complex, modern world. I believe some flexibility for presidents in this area is in the best interests of the nation's security. Finally, should congressional appropriations be considered authorization? The courts have ruled they do. However, Congress disagrees and there are circumstances

where Congress cannot morally cut off funding for ongoing operations without endangering U.S. personnel; negating this as a political tool for Congress.

Constitutional war powers will be a continuous source of disagreement between the president and Congress. There likely will never be a single right answer as to how branches should share the powers. Nevertheless, the WPR has undeniably rebalanced the war powers relationship between the executive and legislative branches. It gives presidents the flexibility to act in short-term operations in which Congress would prefer to avoid.⁷³⁰ It also ensures Congress has a seat at the table for large conflicts, in which the Constitution requires congressional action. The changing nature of warfare may require future changes to the WPR. However, history has shown change is very hard due to the political stakes involved for both branches. As a result, the president and Congress must continue to work within the WPR's framework to chart the best course of action for the nation in times of war.

⁷³⁰ Ford, Christopher A., "War Powers as we live them," page 51.

Appendix 1 – The War Powers Resolution, Public Law 93-148



Public Law 93-148
93rd Congress, H. J. Res. 542
November 7, 1973

Joint Resolution

Concerning the war powers of Congress and the President.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

War Powers
Resolution.

SHORT TITLE

SECTION 1. This joint resolution may be cited as the "War Powers Resolution".

PURPOSE AND POLICY

SEC. 2. (a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof. USC prec. title 1.

(c) The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

CONSULTATION

SEC. 3. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

REPORTING

SEC. 4. (a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

87 STAT. 555

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

87 STAT. 556

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;

the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

(b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

(c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

CONGRESSIONAL ACTION

SEC. 5. (a) Each report submitted pursuant to section 4(a)(1) shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

87 STAT. 556

87 STAT. 557

CONGRESSIONAL PRIORITY PROCEDURES FOR JOINT RESOLUTION OR BILL

SEC. 6. (a) Any joint resolution or bill introduced pursuant to section 5(b) at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and such committee shall report one such joint resolution or bill, together with its recommendations, not later than twenty-four calendar days before the expiration of the sixty-day period specified in such section, unless such House shall otherwise determine by the yeas and nays.

(b) Any joint resolution or bill so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a joint resolution or bill passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out not later than fourteen calendar days before the expiration of the sixty-day period specified in section 5(b). The joint resolution or bill so reported shall become the pending business of the House in question and shall be voted on within three calendar days after it has been reported, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such resolution or bill not later than four calendar days before the expiration of the sixty-day period specified in section 5(b). In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than the expiration of such sixty-day period.

CONGRESSIONAL PRIORITY PROCEDURES FOR CONCURRENT RESOLUTION

SEC. 7. (a) Any concurrent resolution introduced pursuant to section 5(c) shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and one such concurrent resolution shall be reported out by such committee together with its recommendations within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays.

(b) Any concurrent resolution so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents) and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a concurrent resolution passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out by such committee together with its recommendations within fifteen calendar days and shall thereupon become the pending business of such House and shall be voted upon within

three calendar days, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a concurrent resolution passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such concurrent resolution within six calendar days after the legislation is referred to the committee of conference. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report is filed. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement.

INTERPRETATION OF JOINT RESOLUTION

SEC. 8. (a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—

(1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

(b) Nothing in this joint resolution shall be construed to require any further specific statutory authorization to permit members of United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established prior to the date of enactment of this joint resolution and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

(c) For purposes of this joint resolution, the term "introduction of United States Armed Forces" includes the assignment of members or such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

(d) Nothing in this joint resolution—

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

59 Stat. 1031.

"Introduction
of United
States Armed
Forces."

November 7, 1973

- 5 -

Pub. Law 93-148

SEPARABILITY CLAUSE

SEC. 9. If any provision of this joint resolution or the application thereof to any person or circumstance is held invalid, the remainder of the joint resolution and the application of such provision to any other person or circumstance shall not be affected thereby.

EFFECTIVE DATE

SEC. 10. This joint resolution shall take effect on the date of its enactment.

CARL ALBERT

Speaker of the House of Representatives.

JAMES O. EASTLAND

President of the Senate pro tempore.

IN THE HOUSE OF REPRESENTATIVES, U.S.,

November 7, 1973.

The House of Representatives having proceeded to reconsider the resolution (H. J. Res. 542) entitled "Joint resolution concerning the war powers of Congress and the President", returned by the President of the United States with his objections, to the House of Representatives, in which it originated, it was

Resolved, That the said resolution pass, two-thirds of the House of Representatives agreeing to pass the same.

Attest:

W. PAT JENNINGS

Clerk.

I certify that this Joint Resolution originated in the House of Representatives.

W. PAT JENNINGS

Clerk.

IN THE SENATE OF THE UNITED STATES

November 7, 1973.

The Senate having proceeded to reconsider the joint resolution (H. J. Res. 542) entitled "Joint resolution concerning the war powers of Congress and the President", returned by the President of the United States with his objections to the House of Representatives, in which it originated, it was

87 STAT. 559
87 STAT. 560

Resolved, That the said joint resolution pass, two-thirds of the Senators present having voted in the affirmative.

Attest:

FRANCIS R. VALEO
Secretary.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 93-287 (Comm. on Foreign Affairs) and No. 93-547 (Comm. of Conference).

SENATE REPORT No. 93-220 accompanying S. 440 (Comm. on Foreign Relations).

CONGRESSIONAL RECORD, Vol. 119 (1973):

June 25, July 18, considered and passed House.

July 18 - 20, considered and passed Senate, amended, in lieu of S. 440.

Oct. 10, Senate agreed to conference report.

Oct. 12, House agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 9, No. 43:

Oct. 24, vetoed; Presidential message.

CONGRESSIONAL RECORD, Vol. 119 (1973):

Nov. 7, House and Senate overrode veto.

Appendix 2 – Major U.S. Conflicts between 1899 and 1995

Major Conflicts before the WPR – 1899 – 1972 ⁷³¹

Case	Initiation Date	Duration	Congressional Authorization
Philippines	2/1899	14 years	Authorized on 3/22/1899 (30 Stat 977) and 5/26/1900
Colombia/Panama	1901	13 years	Authorized on 2/23/1904 (33 Stat 2234)
Mexico	4/9/1914	2 years, 10 months	Authorized on 4/22/1914 (H. J. Res 251) and again on 7/1/1916 (39 Stat 337)
Haiti	7/28/1915	19 years	Authorized on 2/28/1916 and on 6/12/1916 (39 Stat 223)
Dominican Republic	5/5/1916	8 years, 4 months	Authorized on 2/11/1918 (40 Stat 437)
Trieste, Italy	9/16/1947	7 years	Authorized on 4/4/1949 under NATO treaty, ratified by the U.S. Senate on 7/21/1949
Korean War	6/27/1950	3 years	Authorized through numerous appropriations
Taiwan Straits	8/17/1954	6 months	Authorized on 1/29/1955 (H. J. Res. 159) and by treaty on 2/9/1955
Vietnam	12/12/1955	8 years, 9 months	Authorized on 10/10/1964 (P.L. 88-408) and through numerous appropriation bills
Lebanon	7/15/1958	3 months	Unauthorized
Laos	4/19/1961	18 months	Unauthorized
Thailand	5/19/1962	2.5 months	Unauthorized
Dominican Republic	4/28/1965	17 months	Unauthorized

⁷³¹ Auerswald, David P. and Peter F. Cowhey. "Ballotbox Diplomacy: The [WPR] and the Use of Force," page 519.

Appendix 2 – Continued

Major Conflicts after the WPR – 1973 – 1995 ⁷³²

Case	Initiation Date	Duration	Congressional Authorization
Cyprus	7/1974	2 days (< 60 days)	None
Da Nang	4/5/1975	3.5 weeks (< 60 days)	None
South Vietnam	4/29/1975	1 day (< 60 days)	None
Mayaguez Incident	5/13/1975	2 days (< 60 days)	None
Iran	4/24/1980	1 day (< 60 days)	None
Gulf of Sidra, Libya	8/19/1981	1 day (< 60 days)	None
Lebanon	8/25/1982	3.5 weeks (< 60 days)	None
Lebanon	9/19/1982	18 months	Public Law 98-119 ⁷³³
Grenada	10/25/1983	1 month (< 60 days)	The House passed H. J. Res. 402 to start the war powers clock, though the Senate took no action
Libya	3/23/1986	3 weeks (< 60 days)	None
Persian Gulf	5/17/1987	16 months	Congress demanded executive reports, and some members filed a court suit, all of which led to greater executive reporting on the reflagging exercise
Panama	12/20/1989	1 week (< 60 days)	None
Persian Gulf War	8/28/1990	7 months	Public Law 102-01 ⁷³⁴
Somalia	12/3/1992	15 months	Public Law 103-139, §8151(b)(2)(B) ⁷³⁵

⁷³² Auerswald, David P. and Peter F. Cowhey. “Ballotbox Diplomacy: The [WPR] and the Use of Force,” page 521.

⁷³³ Cited by author.

⁷³⁴ Cited by author. Congress did not provide authorization during the August – December 1990 buildup, but did authorize the use of force through Public Law 102-01 in January 1991. U.S. forces remain in Saudi Arabia and Kuwait to this day.

⁷³⁵ Cited by author.

Appendix 3 – Major U.S. Conflicts since 1995

Case	Initiation Date	Duration	Congressional Authorization
Iraq (no-fly zone)	3/1/1991 ⁷³⁶	12 years ⁷³⁷	Public Law 102-1, reaffirmed in §1095(b)(3), and §1096(b)(3) of Public Law 102-190 ⁷³⁸
Bosnia	4/13/1993 ⁷³⁹	See next row	Authorized through numerous appropriations ⁷⁴⁰
Bosnia Peacekeeping	12/6/1995 ⁷⁴¹	11 years, 7 months ⁷⁴²	Authorized through numerous appropriations ⁷⁴³
Afghanistan and Sudan Airstrikes	8/20/1998 ⁷⁴⁴	1 day (< 60 days)	None
Kosovo	3/24/1999 ⁷⁴⁵	78 day air campaign ⁷⁴⁶	Unauthorized, but appropriated under Public Law 106-31, 113 STAT. 76. ⁷⁴⁷
Afghanistan/ War on Terror	10/7/2001 ⁷⁴⁸	Over 12 years, still ongoing	Public Law 107-40 ⁷⁴⁹
Iraq	3/19/2003 ⁷⁵⁰	8 years, 9 months ⁷⁵¹	Public Law 107-243 ⁷⁵²
Libya ⁷⁵³	3/19/2011	10/31/2011 (seven months)	Unauthorized

⁷³⁶ The author is assuming the no-fly zone begins the day after the Persian Gulf War ceasefire of February 28, 1991.

⁷³⁷ The author is assuming the no-fly zone ends the day before the March 19, 2003 U.S. invasion of Iraq.

⁷³⁸ Grimm, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 26, Public Law 102-1, and Public Law 102-190, §1095(b)(3), and §1096(b)(3).

⁷³⁹ Grimm, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 56.

⁷⁴⁰ For more information, see section in this chapter titled *Operations in Yugoslavia – 1992-1999*.

⁷⁴¹ Grimm, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 31.

⁷⁴² Note – combined duration for total involvement in Bosnia. The final significant U.S. forces involved in the Bosnia peacekeeping effort departed the country on December 2, 2004 – Associated Press, “U.S. Troops Mark End of Mission in Bosnia,” *The Washington Post*, November 25, 2004, A19.

⁷⁴³ For more information, see the section in this chapter titled *Operations in Yugoslavia – 1992-1999*.

⁷⁴⁴ Grimm, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 61.

⁷⁴⁵ Grimm, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 61.

⁷⁴⁶ Although the air campaign lasted only 78 days, a small number of U.S. personnel are still stationed in Kosovo as part of the NATO Kosovo Force (KFOR), see http://www.nato.int/cps/en/natolive/topics_48818.htm.

⁷⁴⁷ For more information, see the section in this chapter titled *Operations in Yugoslavia – 1992-1999*.

⁷⁴⁸ Grimm, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 41.

⁷⁴⁹ For more information, see the section in this chapter titled *The War on Terror (Afghanistan and Iraq) – 2001-Present*. Note, all anti-terrorist operations, including drone strikes against Al Qaeda targets in Pakistan, Yemen, and other areas also fall under the authorization of Public Law 107-40.

⁷⁵⁰ Grimm, Richard F., “The War Powers Resolution: After Thirty-Eight Years,” page 67.

⁷⁵¹ Logan, Joseph, “Last U.S. Troops Leave Iraq, Ending War,” *Reuters*, December 18, 2011.

⁷⁵² For more information, see the section in this chapter titled *The War on Terror (Afghanistan and Iraq) – 2001-Present*.

⁷⁵³ For more information, see the section in Chapter 2 titled *Libya – 2011*.

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Curriculum Vitae

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EDUCATION

The Johns Hopkins University, Baltimore, Maryland

- Master of Arts in Government, May 2015

Georgetown University, Washington, D.C.

- Master of Business Administration, July 2011

The University of Georgia, Athens, Georgia

- Master of Accountancy, August 2006

Virginia Polytechnic Institute and State University, Blacksburg, Virginia

- Bachelor of Science, Accounting and Finance, Magna Cum Laude, December 2000

PROFESSIONAL CREDENTIALS

Certified Public Accountant

- Licensed in the Commonwealth of Virginia, February 2004 to Present

WORK EXPERIENCE

Defense Contract Audit Agency (DCAA), Springfield Branch Office, Supervisory Auditor

- June 2011 to Present

Defense Contract Audit Agency (DCAA), Springfield Branch Office, Senior Auditor

- August 2006 to June 2011

Clark Enterprises, Inc., Clark Construction Group, Senior Accountant

- February 2003 to July 2005

Ernst & Young, LLP/Arthur Andersen, LLP, Tax Compliance Specialist/
Senior Tax Accountant

- January 2001 to February 2003
- *Ernst & Young's McLean, Virginia office acquired Arthur Andersen's Vienna, Virginia tax practice in May 2002*